TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 217.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JUNE 30, 1917.

(26,021)

(26,021)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 554.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript from the District Court of the United States for the Southern District of New York	1	1
Petition for allowance of appeal and order	1	1
Bill of complaint	3	2
Exhibit A—Agreement, dated October 15, 1887	41	25
Answer	59	36
Decree	62	37
Opinion of court	64	38
Assignment of errors	88	53
Citation	90	54
Stipulation that record contains all papers and waiver of praecipe	91	55
Stipulation waiving bond	92	55
Clerk's certificate	93	56
Opinion	94	56
Decree	99	58
Petition for appeal	101	58
Order allowing appeal	103	59
Assignment of errors	105	60
Bond	109	62
Clerk's certificate	115	68
Citation and service	116	69

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 2, 1917.

a United States Circuit Court of Appeals, Second Circuit.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-Appellee,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-Appellant.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States for the Southern District of New York.

United States Circuit Court of Appeals, Second Circuit. Filed Mar. 5, 1917. William Parkin, Clerk.

1 *Petition for Appeal and Order Granting Same.*

United States District Court, Southern District of New York.

In Equity, No. 14–45.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

To the Honorable Martin T. Manton, District Judge and one of the Judges of the above named Court, Presiding therein:

The above named defendant, The Western Union Telegraph Company, conceiving itself aggrieved by the order and decree made and entered by the above-named Court in the above entitled cause under date of February 28th, 1917, wherein and whereby it was ordered, adjudged and decreed that a certain contract dated October 15th, 1887, between complainant and defendant, a copy of which is attached to the bill of complaint herein as Exhibit A, is lawful and binding upon the parties thereto and still in full force and effect in all of its provisions notwithstanding the Conference
2 Ruling of March 18th, 1916, of the Interstate Commerce Commission; that defendant specifically perform said contract; that defendant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract; and that the provisions of the Act to Regulate Commerce, as amended June 18th, 1910 (U. S. Comp. Stat. § 8563, subd. 3) authorizes the making of contracts, or the continued performance of contracts theretofore made, between the complainant railroad company and defendant telegraph company, by the terms of which said com-

panies agree to exchange services upon bases other than their regular tariff rates, does hereby appeal from the said order and decree of February 28th, 1917, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

RUSH TAGGART,
Solicitor for Defendant.

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

Done in open court, this 2d day of March, 1917.

MARTIN T. MANTON,
District Judge and one of the Judges of said United States District Court, Presiding Therein.

3 *Bill of Complaint.*

In the District Court of the United States for the Southern District of New York.

In Equity.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

against

WESTERN UNION TELEGRAPH COMPANY, Defendant.

Bill of Complaint.

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

Your orator, The Baltimore & Ohio Railroad Company, a corporation of the State of Maryland, brings this its bill of complaint against Western Union Telegraph Company, a corporation of the State of New York, and says:

I. That your orator is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, is a citizen and resident of said State and has its principal place of business in the City of Baltimore in said State.

II. That defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York, is
4 a citizen of said State and has its principal place of business in the Borough of Manhattan, City of New York in said State, and is a resident of the Southern District of New York.

III. That this cause is one wholly between citizens of different States; that the subject matter thereof and the amount in contro-

versy is of the value of more than $3,000, exclusive of interest and costs, and that this cause arises under and involves the construction of a law regulating commerce, to wit, "An Act to regulate commerce," approved February 4, 1887, commonly known and hereinafter referred to as the "Interstate Commerce Act."

IV. That your orator is a railroad corporation and controls and operates under lease, ownership or otherwise upwards of nine thousand miles of railroad including the following lines of railroad:

From Philadelphia, Pa., to Baltimore, Md.; from Baltimore, Md., to Washington, D. C.; from Baltimore, Md., westward through the States of Maryland, Virginia, West Virginia, Pennsylvania, Ohio, Indiana and Illinois, and reaching among others the cities of Pittsburgh, Wheeling, Cleveland, Columbus, Cincinnati, Chicago and St. Louis. That your orator also controls by stock ownership subsidiary companies and that the trains of your orator are operated, under certain agreements, over the lines of said subsidiary companies and over the lines of other railroad companies between Philadelphia and New York City.

V. That under date of October 15, 1887, a written contract was entered into between defendant and your orator, for itself and for all the railroads which were then owned, leased or controlled by your orator or which might thereafter be owned, leased or controlled by it during the continuance of said contract, a copy of which contract is hereto annexed, marked "Exhibit A," and made part of this bill.

That by the terms of said contract it was provided, among other things, as follows (your orator being referred to as the "Rail-
5 road Company" and the defendant as the "Telegraph Company"):

In the second paragraph thereof, that certain telegraph lines, therein described as "exclusive railroad wires," should be deemed to include the necessary instruments, switches, local batteries, loops and connections, as then located, arranged and used on said wires and as necessary to continue in operation the existing effective telegraphic circuits between the several stations and offices of the Railroad Company in the various cities, towns and places on the routes of the railroads then owned, leased, operated or controlled by the Railroad Company, and also to include one wire between Philadelphia and New York City, together with the local wires in New York City then connecting the various offices and piers of the Railroad Company as then located and arranged and as more fully shown in a schedule attached to said contract.

In the third paragraph thereof, that the Railroad Company was to retain the ownership of said "exclusive railroad wires."

In the fourth paragraph thereof, that the Telegraph Company agreed to maintain, repair and construct, at its own cost, all the telegraph lines specifically covered by said contract and more particularly shown in a schedule thereto annexed, including said "exclusive railroad wires" and such additional wires as either the Telegraph Company or the Railroad Company might place thereon, the Railroad Company, however, to furnish the necessary unskilled labor

for such maintenance, repairs and reconstruction and the necessary wire and material, not including brackets and cross-arms, for the maintenance, repair and reconstruction of said "exclusive railroad wires"; that said unskilled labor should not include either foremen, linemen, climbers, framers, or any other laborers who require special skill in connection with telegraph construction and main-
6 tenance in order properly to perform the service, but should include all labor necessary to dig holes and set, re-set and handle poles and other materials; that the Telegraph Company should not furnish any tools required in connection with such work, and that the location of any poles, wires or cables upon the right of way or property of the Railroad Company should from time to time be changed thereon in such manner as the officers of the Railroad Company might direct, so as not to interfere with the operations of the railroad, the Telegraph Company furnishing the skilled labor and the Railroad Company the unskilled labor for such work.

In the fifth paragraph thereof that the Railroad Company shall have the right to acquire from the Telegraph Company, or to erect, additional "exclusive railroad wires" upon the telegraph lines covered by the contract, the Railroad Company paying the cost of wire insulators and other material, not including brackets and cross-arms, and of direction and equipment, and where any such wire should be laid in cable the Railroad Company should be charged only the pro rata cost, with provision for sharing expense of relocation of lines; that the Railroad Company should not be required to furnish any labor in connection with lines not upon its right of way and that the Telegraph Company should connect the "exclusive railroad wires" with additional offices, stations and buildings of the Railroad Company in the cities and towns along its route, and also in the Cities of New York and Brooklyn, where the Telegraph Company had facilities therefor, and that if the Telegraph Company should have underground conduits available for reaching the Railroad Company's offices, stations and buildings, the Telegraph Company should furnish the Railroad Company such connecting wires as it might be able to supply in said conduits upon payment by the Railroad Company of the entire cost of the wire and of placing the same in the conduits and the pro
7 rata cost of construction or rental and maintenance of the conduits.

In the sixth paragraph thereof, that the Telegraph Company should furnish free of cost the use of its main batteries for the efficient operation of all railroad wires and also all instruments, local batteries, stationery and other material for commercial business, and should grant to the Railroad Company for use upon the railroad wires the free use of all telegraphic patents then or thereafter owned or used by the Telegraph Company or its subordinate companies, for the general telegraph business, except that any payments which the Telegraph Company might be required to make on account of such free use to any minority interests in subordinate companies should be charged to the Railroad Company, and that the Railroad Com-

pany should furnish all instruments, local batteries, stationery and other material for railroad business.

In the seventh paragraph thereof, that the railroad wires should be used only by the Railroad Company for its railroad business and should not be used for the transmission of any commercial or public telegraph business for tolls except that where there was but one wire it might be used jointly by the Telegraph Company with the Railroad Company, important railroad messages directing the movement of trains having precedence, until such time as in the judgment of the President of the Railroad Company such joint use might be detrimental to the business of the Railroad Company, whereupon the Telegraph Company should erect an additional wire for commercial business; that in all other cases the railroad wires might be used from time to time by the Telegraph Company jointly with the Railroad Company, with the Railroad Company's assent, when not in use for railroad business; that whenever the railroad wires should become disabled the Railroad Company should
8 have the right to take and use jointly with the Telegraph Company any of the working commercial wires for the purpose of moving its trains or transacting other important and urgent railroad business, such use to continue without cost to the Railroad Company until the repair of the railroad wires had been effected and the circuits restored, but that the through commercial wires or circuits should not be subject to such use by the Railroad Company except in cases of extreme emergency.

In the eighth paragraph thereof, that either party might establish and maintain telegraph stations at such places on said railroads as it might deem necessary; that at all telegraph stations of the Railroad Company it should furnish operators at its own expense; that its operators and other employees acting as agents of the Telegraph Company should receive, transmit and deliver exclusively for the Telegraph Company such commercial or public messages as might be offered and should charge the tariff rates of the Telegraph Company thereon, and should render to the Telegraph Company exclusively monthly statements of such business and full accounts of all receipts therefrom, and pay all of such receipts to the Telegraph Company in such manner and at such times as it might direct, but that in the transaction of all such telegraph business said operators and all other employees should be held to be only the agents of the Telegraph Company and should conform to all rules and regulations and orders of the Telegraph Company applicable to all telegraph business, whether paid or free, and should not, without the consent of the Telegraph Company, transmit over the lines covered by said contract, any free messages except those therein provided for; that whenever the number of paid and collect messages sent from any railroad office should amount to $3,000 or more in any one year, thirty words of press matter being counted as one message, the Tele-
graph Company should thereafter provide an operator for
9 such office so long as said messages amounted to said number, and said operator, acting as the agent of the Railroad Company, should attend to the telegraph business of the Railroad

Company without charge so long as one operator could attend to the telegraph business of both parties; that no employee of the Railroad Company should while in its service be employed in the transaction of commercial or public telegraph business for any party other than the Telegraph Company, and that the Telegraph Company should have the exclusive right to the occupancy of the Railroad Company's depots and station houses for commercial or telegraph business as against any other party.

In the ninth paragraph thereof, that if the Telegraph Company should elect to establish an office in a station building of the Railroad Company, the latter should, if convenient, provide office room therein and light and fuel therefor, free of charge, and if at such station one person could attend to the telegraph business of both companies the operator of the Telegraph Company at such office, acting as agent for the Railroad Company, should attend to the telegraph business of the Railroad Company without charge and conform to the rules of the Railroad Company applicable thereto; that whenever the telegraph business of both companies at any office where the Telegraph Company furnished the operator should become so large as to require more than one operator, the Railroad Company should employ and pay its own operator.

In the tenth paragraph thereof, that the Telegraph Company should receive and transmit from said lines along said railroads, in the order in which they and other messages should be filed with it, and should deliver with promptness and despatch and free of charge the messages of the officers and agents of the Railroad Company pertaining to its railroad business, between all cities and towns and places then reached by said telegraph lines on said railroads; that such messages should be received at and delivered from any of the offices of the Telegraph Company or its subordinate companies in any of said cities, towns or places, and when so received, should be transmitted by the Telegraph Company over said telegraph lines free of charge, and that if the same for any reason of convenience to the Telegraph Company should be transmitted by other lines to the place of destination, no charge should be made therefor; that the Telegraph Company should issue to such officers of the Railroad Company as might be designated by the President or other authorized officer of the latter, annual franks authorizing the free transmission of messages relating strictly to railroad business of the Railroad Company originating at and destined to points on the lines then or thereafter owned or operated by the Telegraph Company or its subordinate companies in the Telegraph Company's general telegraph system beyond or off the lines of said railroads, to an amount not exceeding $10,000 per annum, calculated at the regular day rates of the Telegraph Company between the points at which said messages should originate and the points to which they might be destined; that the Railroad Company should pay to the Telegraph Company one-half of its aforesaid rates on all such messages in excess of said amount, settlements to be made yearly; that the free telegraphic service provided for in said contract should apply only to the transmission of messages concerning the

operation and business of the Railroad Company's railroads covered by said contract, and should not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the Railroad Company, the tolls on which messages should properly be chargeable to such customers.

In the eleventh paragraph thereof, that the Railroad Company should transport free of charge over its railroads, on application of the Telegraph Company, all employees of the latter when
11 traveling on its business or engaged in its work along said railroads, and transport and distribute free of charge all poles and other material and supplies of the Telegraph Company for the construction, maintenance, renewal and reconstruction of said telegraph lines covered by said contract, along said railroads, and all such additional wires as might be erected on said telegraph lines and of the lines and wires provided for by said contract on extensions, branches and acquired roads, and also all material and supplies for the establishment, maintenance and operation of the offices of both parties to said contract upon said telegraph lines at places along said railroads; that the Railroad Company should transport free of charge the employees of the Telegraph Company when traveling on its business or engaged in its work, and the poles and other materials and supplies of the Telegraph Company required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the Telegraph Company other than those above referred to, whether on or off the lines of said railroads, to an amount not exceeding $10,000 per annum, calculated at the current transportation rates of the Railroad Company, and that the Telegraph Company should pay to the Railroad Company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount, settlements to be made yearly.

In the twelfth paragraph thereof, that the Telegraph Company should pay to the Railroad Company the sum of $60,000 per annum, in equal installments of $5,000, at the close of each month during the continuance of the contract, accounting from October 15, 1887.

In the thirteenth paragraph thereof, that the Railroad Company should not be responsible for and the Telegraph Company should save it harmless and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Company, while being carried
12 free or at half rates over said railroads under said contract, whether such loss or damage should arise from the neglect of said Railroad Company or its employees or otherwise, and should likewise indemnify and save harmless the Railroad Company from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company and on account of any other public telegraph business, and that the Telegraph Company should not be responsible for and the Railroad Company should indemnify and save it harmless against any loss or damages of any kind arising from or on account of any error or failure, delay

or default in the transmission or delivery of any and all messages sent for the Railroad Company under said contract.

In the fourteenth paragraph thereof, that the contract should not have the effect of creating a covenant of quiet enjoyment on the part of the Railroad Company in favor of the Telegraph Company, as against the owner of the fee of the land over which the Railroad Company or any of its subordinates might have the right of way, nor as against the power of eminent domain on the part of any other companies possessing it by grant from any State or the United States, and that neither party should have any claim for damages by reason of any excess or defect of corporate or legal authority to make such contract or any part thereof.

In the fifteenth paragraph thereof, that the provisions of said contract should apply to any new extensions or branches built or other railroads acquired by purchase, lease, ownership by stock or otherwise, by the Railroad Company, and to the telegraph lines thereon, to the same extent as if such lines and railroads had been originally included in said contract, and that if there should be no telegraph line on any such roads, then the Telegraph Company should furnish material and construct one thereon and maintain, repair and reconstruct the same, the Railroad Company furnishing the un-
13 skilled labor therefor; that the Telegraph Company should set apart on any such railroads, for the Railroad Company's business, one exclusive railroad wire, and that if there should be a telegraph line owned, leased or controlled by the Telegraph Company already erected on any such road, then that there should be set apart for the use of the Railroad Company such exclusive railroad wire or wires thereon as might have been previously used for railroad business exclusively; that if the Railroad Company should acquire a telegraph line on any such road, the Railroad Company should sell and the Telegraph Company should purchase such telegraph line on a valuation to be agreed upon, based on the cost of constructing and equipping a similar line, less the cost of unskilled labor, with a proper deduction for decreased value of the material and equipment of the line as compared with new material and equipment; that if the parties could not agree on such valuation the same should be fixed by arbitrators to be appointed as provided in said contract; that upon all such extensions, branches and leased, controlled or thereafter acquired roads, the Railroad Company should be entitled to free telegraphic service to the same extent and in the same manner as provided by the first clause of paragraph Tenth of said contract on the railroads originally covered by said contract, and that the $10,000 per year limit of free telegraphic service, as provided by the second clause of said paragraph Tenth, should be increased $6 per annum for each mile of such road occupied by the Telegraph Company's lines upon such extensions, branches, leased, controlled or thereafter acquired roads; that the Telegraph Company should be entitled to free transportation service for employees, poles and other material and supplies, to the same extent, for use thereon and in the same manner as provided by the first clause of paragraph Eleventh of said

contract, and that the $10,000 per annum limit for free trans-
14 portation provided for by the second *class* of said paragraph Eleventh should be increased $6 per annum per mile of such road occupied as aforesaid.

In the sixteenth paragraph thereof, that the Railroad Company, so far as it legally might, granted and covenanted and agreed to assure to the Telegraph Company the exclusive right of way, on, along and under the lands, roads and bridges of the Railroad Company and any extensions and branches thereof, and any leased, operated or controlled roads, and the full and exclusive use and enjoyment thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to erect from time to time such additional wires upon said existing lines of poles and any renewals thereof upon said railroads, and also the right to construct one additional line of poles and wires or an underground line, upon, along or under said railroad as the Telegraph Company might deem expedient, but that the location of any such additional line of poles and wires or underground structures should be made in such way as not to interfere with the operations of the Railroad Company and at such places on the right of way or lands of the Railroad Company as should be designated by the proper officer of the Railroad Company; that the Railroad Company would clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for in said contract so far as it legally might, that the Railroad Company would not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or any telegraph or telephone line in competition with the lines or business of the Telegraph Company, except for the Railroad Company's current legal rates, nor would it furnish for any competing line and facilities or assistance that it might lawfully withhold, nor stop its trains nor distribute its material thereon at other
15 than regular stations, so far as much refusal and limitation of transportation might be lawful, but that the Railroad Company should not be required to furnish unskilled labor for the construction, maintenance, removal or reconstruction of any other than the telegraph lines then existing and renewals thereof, upon said railroads and the additional wires that might be placed thereon and the lines provided for on extensions, branches and acquired roads.

In the seventeenth paragraph thereof, that the term "subordinate companies" should be deemed to include all companies controlled by ownership of stock, lease, contract for operation or in any other manner, by either party, and that the term "telegraph line" should be deemed to include the line of poles, wires, cables, batteries connected therewith and other devices necessary for efficient telegraphic operation.

In the eighteenth paragraph thereof, that the telegraph lines covered by said contract should form part of the general telegraphic system of the Telegraph Company and be controlled and regulated by it, and that it should fix and determine all tariffs for the trans-

mission of messages and of connections with other lines and interests; that no wire then or thereafter owned, leased, controlled or used by the Railroad Company should at any time be used or employed directly or indirectly in competition with the Telegraph Company or by or for any party other than the Railroad Company and the Telegraph Company, and that the Railroad Company should not at any time during the continuance of the contract engage in or transact any commercial or public telegraph business excepting for the Telegraph Company under the provisions of the contract.

In the nineteenth paragraph thereof, that the management and control of the railroad employees, so far as engaged in telegraphic duties upon said railroads, and of the employees of the Telegraph Company engaged in the maintenance, repair, renewal and
16 reconstruction of said telegraph lines along said railroads and the transportation of men, material and supplies therefor, should be vested in a competent joint superintendent of telegraph, who should be appointed and whose salary should be fixed by the Railroad Company, with the approval of the Telegraph Company, which salary should be paid equally by the Railroad Company and the Telegraph Company; that said joint superintendent should be removable for cause by either party and should be subordinate to and under the control of the Telegraph Company so far as necessary to enforce its rules, regulations and orders regarding the maintenance, repair, renewal or reconstruction, operation, management and arrangement of its lines, and the transaction of the commercial telegraph business upon said railroads; that said joint superintendent should decide upon the number of linemen to be employed for ordinary repairs and the places at which they should be stationed, after consultation with both parties, and that he should also be subordinate to and under the control of the Railroad Company so far as necessary to enforce its rules, regulations and orders regarding the maintenance, management, arrangement and operation of its exclusive railroad wires, and that he should co-operate with both parties in giving the utmost efficiency to the working of all lines upon said railroads and the proper transaction of the railroad and commercial telegraph business thereon, and that the Railroad Company should furnish office room and light and fuel therefor for said joint superintendent and that each party should supply the clerical force for its own business.

In the twentieth paragraph thereof, that in case of any disagreement between the parties concerning the meaning of any provisions of the contract or operations thereunder, there should be arbitration.

In the twenty-first paragraph thereof, that said contract should terminate all previous agreements between the parties, should continue in force for fifty years from October 15, 1887, and
17 might be renewed after the expiration of such term for further terms of fifty years each by either party giving written notice to the other to that effect at least six months prior to the expiration of the preceding period, and that a violation of any of the provisions of the agreement by either party, while entitling the other to a claim for damages and the usual remedies for specific en-

forcement, should not be held to void the agreement or to abrogate the obligations or the undertakings of either party thereto.

VI. That none of the service to be rendered by either party to said contract to the other, in accordance with the terms thereof, is free in the sense of gratuitous, but that all such service is fully compensated for by the various interwoven considerations in said contract, which considerations are the bases of the mutual undertakings thereunder, and that each party to said contract receives from the other just and reasonable and full remuneration for the services to be rendered by it under said contract, such remuneration being paid, in accordance with the terms of said contract, in services rendered by the other party thereto and in other manners as in said contract provided. That it is essential to the efficient, proper and safe operation of trains by your orator over its several lines of railroad, not only to meet usual but also emergency and extraordinary demands, and is essential to the proper discharge by your orator of its duty to the public, that your orator should have at all times available to it, instant, first-hand and unlimited telegraphic service, not only along the immediate right of way of your orator's said railroads, but also between various offices of your orator's railroad system along such lines and offices necessarily maintained by your orator for said proper discharge of its duty in the City of New York and at other places throughout the United States not on said lines of railroad, and more particularly between the City of Philadelphia and the City of New York, between which the trains of your orator are operated,
18 under certain agreements, over the lines of other railroad companies, including subsidiary companies which are controlled by your orator through stock ownership, and that if such telegraphic service were not furnished to your orator by the defendant or some other equally equipped telegraph company affording similar and as comprehensive service, your orator would be compelled, as an operating necessity, to construct and maintain for itself, not only telegraph lines along the lines of your orator's said railroads, but also telegraph lines between the City of New York and the City of Philadelphia and between points on your orator's said railroad system and other important centers throughout the United States.

VII. That in the year 1906 the Congress enacted the so-called Hepburn Act, approved June 29, 1906, by which Section 6 of the Interstate Commerce Act was amended so that it provided, among other things, as follows:

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

That on September 15, 1906, the Interstate Commerce Commission formally announced in a general tariff circular, the following Administrative Ruling:

"Payment for Transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

That on October 12, 1906, said Commission announced a further Administrative Ruling with respect to free passes and free transportation in which, among other things, it stated that the Commission did not construe the latter as preventing a carrier from giving free or reduced rate carriage over its own lines to contractors, for materials, supplies and men for use in the construction, improvement or renewal work on the line of that carrier, provided such arrangements for free or reduced carriage are made a part of the specifications upon which the contract is based and of the contract itself.

That on December 21, 1906, said Commission announced its report "In the Matter of Railroad-Telegraph Contracts" (12 I. C. C. Reps., Vol. XII, p. 10), in which it affirmed and construed said Administrative Rulings of September 15th and October 12th, 1906, and stated that in making said ruling of October 12th the Commission intended to be understood as holding that the provisions of law permitting carriers to accord free or reduced-rate transportation under certain conditions and for certain purposes only, applied, inter alia, to materials, supplies and men required under contracts between railroad and telegraph companies for the construction, maintenance and operation of telegraph lines upon and along the rights of way of such railroad companies, and for use in connection with the operation of their own lines; and as implying also that, inasmuch as a telegraph service along their own rights of way is a necessary part of their equipment and is essential to the safe operation of trains by railroad companies, the legality of such free or reduced-rate transportation so accorded by carriers to such telegraph companies is not affected by the fact that telegraph companies are frequently permitted by the carriers to use the telegraph lines so erected along their own rights of way in the performance by such companies of a telegraph service for the public. That the Commission further stated that it had heard the arguments of counsel for telegraph companies for a modification of the above rulings, so far as they might control and govern certain contracts between the telegraph companies and certain railroad companies under which, in consideration of the free telegraph service accorded by the telegraph companies over wires on the lines of the respective contracting railroad companies, the latter agreed to furnish free or reduced-rate transportation to such telegraph companies for the men,

materials and supplies necessary in connection with the construction, operation and maintenance of such telegraph lines off the lines of the respective contracting carriers and upon the rights of way of other carriers, and the Commission further held as follows:

"The Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely. Nevertheless, the Commission knows of no provision of the law now in force which vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers."

21 That the Commission further held that "such contracts with telegraph companies may lawfully be entered into," by railroad companies, and that in consideration of the construction, maintenance and operation of the telegraph line upon the right of way, which telegraph line the railroad company would otherwise be compelled, as an operating necessity, to construct and maintain, the carrier may accord to the telegraph company free or reduced-rate transportation for the men, materials and supplies of the telegraph company required and necessary in connection with the construction, maintenance and operation of the telegraph lines upon such carriers' own right of way; but that so much of any such contract between a telegraph company and a railroad company as stipulates or contemplates that such railroad company will furnish free or reduced-rate transportation for the employes, materials or supplies of the telegraph company, in connection with the construction, maintenance and operation of a telegraph line and service off lines of such carrier (or system) was unlawful under the terms of the Act to Regulate Commerce; that no railroad or system could lawfully stipulate or contract with a telegraph company for the carriage of its employes or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation and maintenance of a telegraph service on its own lines or system.

That on June 3, 1907, said Commission announced its Administrative Ruling No. 219, with respect to "transportation of men or property for telegraph companies," in which it referred to and amplified such provisions, rulings and decisions.

That on November 15, 1907, said Commission announced an Administrative Ruling applying said Ruling No. 219 to telephone service and calling upon carriers that had not already done so

22 promptly to file with said Commission copies of all contracts for telegraph or telephone service on their lines.

That as your orator is informed and believes, all of the contracts then existing between the various railroad companies and the various

telegraph companies for the exchange of service were thereupon filed with said Commission and remain there filed.

VIII. That your orator, acting in the belief that the aforesaid Hepburn Act and the aforesaid Administrative Ruling of September 15, 1906, announced by the Interstate Commerce Commission, required it so to do, on October 1, 1906, informed defendant that because of said statute as amended it would not further perform said contract to the extent of furnishing interstate transportation for employees and material in connection with the construction, operation and maintenance of telegraph lines off the lines of its railroad, and that it would thenceforth demand of defendant the usual and full rates of carriage on all materials and supplies for repairs, improvements, renewals or extensions of said telegraph lines, consigned to points off the line of your orator's railroad, and demand the usual full passenger and freight rates for carriage over said lines of railroad for such of the employees of defendant as were traveling and material as was shipped to points off the line of your orator's said railroad.

That thereafter, to wit, in the year 1908, defendant filed a bill of complaint against your orator in the United States Circuit Court for the District of Maryland, wherein it prayed that Court to decree that said contract was still in full force and effect, and that your orator might be required specifically to perform the same.

That to said bill of complaint your orator interposed its answer, wherein it alleged by way of defense that its refusal to perform certain obligations created by said contract and its statement that such portions of said contract were annulled by said Hepburn Act, were in strict conformity with the rulings of said Interstate Commerce Commission and with the provisions of said Hepburn Act, as interpreted by said Commission, and that its said refusal was due to and because of the rulings of said Commission and advice of counsel that said rulings were lawful and in conformity with said Hepburn Act, and that it was your orator's legal duty strictly to comply therewith.

That by express leave of said Court said Interstate Commerce Commission, through its solicitor, submitted and filed a written argument on behalf of said Commission as amicus curiae, and that thereupon argument for both parties was heard by said Court.

That before said Court had made any decision in said case the Congress enacted an act approved June 18, 1910, entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February 4, 1887, as heretofore amended, and for other purposes," which Act extended the provisions of the Interstate Commerce Act to telegraph, telephone and cable companies, and amended Section 1 of said Interstate Commerce Act so that it contained, among other provisions, the following:

"That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

That your orator begs leave hereinafter again to refer to said stat-

ute and the circumstances and the history of the relations between railroad and telegraph companies preceding and at the time of the enactment thereof.

That immediately after the approval of said statute, the parties to said suit, acting in the belief that the meaning and intent of said statute was to permit the continued performance by them of the obligations which they had contracted to perform under said
24 contract, "Exhibit A," consented to the withdrawal of said suit, and said United States Circuit Court for the District of Maryland thereupon entered its decree in said suit by the Western Union Telegraph Company against The Baltimore & Ohio Railroad Company, in language as follows:

"This cause having come on to be heard at this Term of Court, and having been submitted for final decree upon Bill and Answer, and the Court having heard argument of Counsel for both parties, and it appearing that since the hearing there has been enacted by Congress an 'Act to create a Commerce Court, and to amend the Act entitled "An Act to Regulate Commerce," approved February 4, 1887, as heretofore amended, and for other purposes,' and the said Act having been approved by the President on the 18th day of June, 1910, and the complainant having in consequence of certain provisions in said Act which make it in its judgment unnecessary to proceed with the said case, prayed leave to withdraw its suit, it is ordered and decreed this 22nd day of June, 1910, that the complainant have leave to withdraw its said suit without prejudice, the complainant to pay all costs."

That thereafter your orator and defendant proceeded again fully to perform their respective obligations under their said contract and adjusted their relations for the period intervening between October 1, 1906, and the entry of said decree, in accordance with the terms of said contract, and that with the exception of said period your orator has at all times fully and faithfully observed, kept and performed all the obligations and requirements under said contract on its part to be observed, kept and performed, and has faithfully carried out all the provisions thereof and has expended large sums of money in furnishing facilities to the defendant, and has permitted defendant to make use of and enjoy for its poles and lines, the right of way of your orator, which is of a value of many hundred thousands of dollars, and the defendant has at all times availed itself of
25 the facilities thus afforded by your orator without complaint on its part that your orator was in any respect delinquent in failing to render to the defendant all the service and benefits that it was entitled to receive and enjoy under each and every of the provisions of said contract, and your orator now stands ready and is able and willing, and hereby tenders performance and continued performance to the defendant of each and every provision thereof, and of all the conditions and obligations imposed upon your orator thereby, and alleges that upon such performance on its part it is entitled to require from the defendant the performance of all the provisions of said contract thereby required to be performed on the part of the defendant.

IX. That said contract was continuously and in good faith observed and performed by the defendant until on or about April 25, 1916, when your orator was notified by defendant, in effect, that because of the approval and adoption on March 28, 1916, by said Interstate Commerce Commission of a conference ruling reading as follows:

"Upon inquiry as to whether or not under the provision of Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act. Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph Company regularly
26 charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

it would continue to carry out its contract in respect of the transmission of messages under franks, but would charge for such messages at its regular rates up to the contract allowances, billing your orator at full rates for excesses over those allowances; that since said date defendant has billed and continues to bill to your orator at the usual and full rates for the transmission of interstate messages off the lines of your orator, even though such messages were in the interest of your orator's business in the maintenance and operation of its railroads and included in and covered by said contract, and the defendant then asserted and has ever since asserted, and now asserts, that the performance of the obligations assumed by and imposed upon it in and by said contract in this respect is within the prohibition of said conference ruling of said Interstate Commerce Commission, except upon payment in money at the usual and full rates charged by defendant for its commercial business.

X. That defendant, Western Union Telegraph Company, shortly after its incorporation in the year 1851, began the work of construction and operation of telegraph lines in the State of New York and other states, and has continuously since that time been engaged in the work of constructing and operating telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired the use of a continuous system of telegraph lines which now ex-

27 tends through all the states and territories of the United States and into portions of the Dominion of Canada, and connects with telegraph lines in the Republic of Mexico, and, through the said land lines of Mexico, with the telegraph lines of the Central and South American republics, and, by means of submarine cables, with the telegraph systems of foreign countries; that at the present time its system of telegraph lines operated and controlled by it, as aforesaid, comprises over 200,000 miles of poles and cables, and over 1,000,000 miles of wire; that upon said system of telegraph lines defendant has nearly 25,000 offices, about 20,000 of said offices being railroad offices yielding revenues too small to pay for maintenance, separate and apart from the advantages derived from contracts with railroad companies as hereinafter referred to, and which, but for such contracts, could not be maintained as independent telegraph offices, and would not, therefore, afford telegraphic facilities to the public; that defendant transmits yearly about 65,000,000 messages for the public and for the Government of the United States, and for the governments of foreign countries, exclusive of messages transmitted upon railway business, exclusive of office messages for defendant, and exclusive also of messages forwarded by private parties leasing wires from defendant; that said system of lines has been built up so as to connect with and be largely operated from, the central offices of the defendant, which are situated in the City of New York, and said lines radiate therefrom to all important cities and commercial centers, and to many thousands of towns and villages in the United States and in North America, and through the ocean cables and land lines above described to all important commercial centers of this continent and the continent of Europe, and, through lines there situated, with the telegraph lines in all parts of the world; that among the lines of telegraph forming an important

28 part of said system of defendant and connected with its main office, as aforesaid, in the City of New York, thereby connecting with all parts of the world as aforesaid, are lines of telegraph over and along the railroad and branches thereof of your orator.

XI. That one of the first uses of the telegraph after its invention was in connection with the operation of railroads, and that practically throughout the entire history of the operation of railroads in the United States down to the present time railroads have required and now require telegraph lines and the use thereof for their successful and safe operation; that for many years it has been and is now the custom of railroads operating in the United States to send their freight cars to final destination, without unloading, over the tracks of other companies, so that, as modern railroad operations are conducted, cars belonging to one railroad company are scattered along the tracks of nearly every other railroad company in the United States from the Atlantic Ocean to the Pacific Ocean and from Canada to the Gulf of Mexico, and that it is not merely desirable, but absolutely necessary, that the whereabouts of the particular cars of freight should be known to a railroad company at all times, and that the only means of obtaining such knowledge is through the instrumen-

tality of the telegraph, and that telegraph lines are required by railroads not only along their own rights of way, but to reach points upon other lines of railroad; that because of such and other reasons and necessities, there has grown up a relationship between railroad companies and telegraph companies for the exchange of services which has been embodied in contracts similar to said Exhibit A, which, as far back as the middle of the last century, were common between railroads and telegraph companies when they were in their infancy; that such contracts present strong economical and business reasons in the interest of the public for their existence; that the telegraph companies require a speedy means of reaching all parts of their lines for repairing breaks caused by storms, and this facility is
29 afforded by the railroad companies; that the telegraph companies also require speedy methods of transporting their material and distributing it where needed; that such advantages are furnished by a railroad line but not by a highway line, and the lines of telegraph constructed along the rights of way of railroads furnish on the other hand to the railroads an ample surplus of facilities for the operation of the railroad, as aforesaid; that the economy and efficiency resulting from the construction of a pole line along the right of way of a railroad company as compared with the construction of a pole line along an independent right of way paralleling the railroad, have enabled the telegraph companies not only to offer commercial service in districts and at thousands of points where otherwise it would have been impossible except at prohibitive rates, but also have enabled the commercial service offered by the telegraph companies in general to be offered at materially lower rates to the public; that there are at the present time few, if any, railroads of any importance in the United States that are not operated under such contracts for the exchange of services with a telegraph company, thereby, through the furnishing of rapid and unlimited information as to the whereabouts and progress of railroad trains and the conditions affecting and instructions directing their movements, facilitating the safe, efficient and rapid operation of trains and contributing to the convenience and welfare of the public, and also, by the furnishing of rights of way and offices by the railroad companies in thousands of localities throughout the country, where commercial business of the telegraph companies would not be sufficient to support them, enabling the public to enjoy the advantages of the telegraph and avail itself of the necessity thereof for commercial, educational and social purposes.

That under the system of interstate traffic now existing in the United States, it is essential to the efficient and proper operation
30 of the interstate railroads of the country and the proper discharge by them of their duty to the public, that they should have at all times available to them, instant, first-hand and unlimited telegraph service, not only along their immediate respective rights of way, but also between various offices of said railroads along their said respective rights of way and offices necessarily maintained by them at other important centers throughout the United States not on their said respective rights of way, and that if such telegraphic

service were not furnished to such railroads by sufficiently and properly equipped telegraph companies, such railroads would be compelled, as operating necessities, to construct and maintain for themselves, not only telegraph lines along their respective rights of way, but also telegraph lines between their principal termini, junction points and other important stations and commercial centers throughout the United States not directly served by such railroads.

That none of the service contracted to be rendered by either a railroad company or a telegraph company to the other under such contracts, in accordance with the terms thereof, is free in the sense of gratuitous, but that all such service is fully compensated for by the various interwoven considerations in said contracts, which considerations are the bases of the mutual undertakings thereunder and that each party to said contracts receives from the other just and reasonable and full remuneration for the services rendered by it under said contracts, such remuneration being paid, in accordance with the terms of said contracts, in services rendered to it by the other party thereto and in other manners as in said contracts provided, and that in the making of such contracts the various considerations passing from the one party thereto to the other have been estimated and valued and by the parties determined to be equal.

XII. That such exchange contracts between the railroads and telegraph companies provide in general that the railroad shall
31 furnish the exclusive right of way for the telegraph lines, the transportation of men and material for the construction or maintenance or both of the telegraph lines, unskilled labor for construction, transportation for officers and employes of the telegraph company, traveling on its own business, without specific charge of tariff rates, services of telegraph operators where the commercial business of the telegraph company is not sufficient to justify that company in employing an operator exclusively engaged in its work, and office room, heat and light at the railroad's telegraph stations; that the telegraph company shall transmit for the railroad's designated officers or agents, telegrams relating to the railroad's business, without specific charge of tariff rates, furnish instruments and batteries for the railroad's use, maintain the lines, give the railroad's telegraphic orders for the movement of trains precedence over all commercial business on the wires, and give the railroad the right to free use of patents or new discoveries or inventions that the telegraph company owns or shall own or use in its telegraph business; that in some of such contracts the railroad is afforded, without specific charge, only a certain amount of telegraph service and for additional service pays in addition to the other considerations provided in the contract a specific item of consideration calculated either at tariff rates or on some other contract basis; that in others of such contracts the railroad, in addition to the other considerations moving from it, agrees to pay or credit the telegraph company for all telegraph service performed by it under the contract, a specific additional item of consideration calculated on the basis of rates other than the telegraph company's regular tariff of rates; that in some of such contracts the railroad pays full or half rates for telegrams

ordering sleeping car, parlor car or steamer reservations or other accommodations for passengers or customers which properly might be considered the railroad company's business; that the mutual
32 considerations and concessions in such contracts given each to the other by the respective parties thereto, include many services for which there were and are no tariff rates provided or required by law in any event, and that in negotiating such contracts railroad and telegraph companies have met, each endeavoring to secure the maximum facilities for itself and the general public for the least expenditure of money and material, and that it frequently has required months and years of negotiation to reach a final agreement, and that such mutual advantages as the consummated contracts give to the railroad and telegraph companies find expression in lower railroad and telegraph rates to the general public and better and more efficient service by both the railroad and the telegraph company. That prior to the enactment in 1910 of the amendment to the Interstate Commerce Act, as aforesaid, the fact had been recognized by Congressional acts that instant, first-hand and unlimited telegraphic service is essential to the efficient, proper and safe operation of railroad trains; the existence and general nature of contracts between the railroads and the telegraph companies providing for such telegraphic service and for the exchange of services between such companies had become known to and had been commented on by the Federal Courts, including the United States Supreme Court, in important and numerous cases; the operation by the railroads and the telegraph companies under such contracts had been openly followed and it had become to be a matter of common knowledge that practically throughout the entire history of the operation of railroads in the United States such contracts had been in existence.

XIII. That such contracts are the result of many years of experience and long negotiations between the railroads and the telegraph companies, which experience your orator protests is the
33 best foundation for the conclusions reached; that in arriving at the rates to be paid by the parties thereto for the services enjoyed by them respectively under such contracts consideration has always been had to all of the elements entering into such contracts, including the rights of way, the furnishing of poles and wires, batteries and materials, the furnishing of office space, light, fuel, and operators, the amount of freight and labor transportation necessary for the equipment and maintenance of the lines of telegraph wires, the supervision and operation of such lines and the furnishing of stationery and other facilities in connection therewith, and that no part of said contracts, as, for instance, the rates to be charged by and paid to the railroads for transportation of freight and employees under such contracts, or the rates to be charged by and paid to the telegraph companies for transmission of messages thereunder, can be changed without dislocating such contracts in their entirety and destroying every element of mutuality thereunder, thereby destroying and annulling said contracts and depriving the public, as well as the parties thereto, of all the benefits derived therefrom not only in connection with the use and operation

of the railroads, but also in the use of the widespread facilities offered by the telegraph companies.

XIV. That in its Twenty-First Annual Report to the Congress, dated December 23, 1907, said Interstate Commerce Commission (21st Annual Report, p. 25) referred to its aforesaid rulings and reports, and stated in the language hereinbefore quoted that the contracts between the telegraph companies and the carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts of carriers that have come to the attention of the Commission, and that so far as the Commission could then see the full performance of such contracts by the carriers with whom they were made would not affect any
34 public or private interest adversely, but that, nevertheless, the Commission knew of no provision of law then in force which vested it with any authority or any clause in the law which afforded it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. That said Commission also, in its Twenty-Second Annual Report to the Congress, dated December 24, 1908, (22nd Annual Report, p. 129), again referred to said rulings and reports.

XV. That in the light of the history of the relation between the railroads and the telegraph companies in the United States, as hereinbefore set out, and of the interchange of services between such companies based upon the interweaving of valuable and indispensable considerations, as shown by contracts existing throughout the period of railroad and telegraphic operations in the United States, and in the light of the fact that instant, first-hand and unlimited telegraphic service is essential to the efficient, proper and safe operation of railroad trains, as has been often recognized by congressional acts, and the fact that the interests of the public are promoted and not affected adversely by the existence of such contracts between railroad and telegraph companies and the operations thereunder, and that for the reasons aforesaid the destruction of such contracts would seriously injure the public service of the telegraph companies, not only as to the efficiency of such service but also as to the rates at which it could be furnished, and that any statute or ruling which altered any part of the rates as worked out in such contracts and under which services thereunder were exchanged between the railroads and the telegraph companies, would result in destruction of such contracts in their entirety, and having before it the construction placed upon said
35 so-called Hepburn Act by the Interstate Commerce Commission, as aforesaid, to the effect that such Act made it unlawful for such contracts to be carried out in their entirety, and having before it the reports of said Interstate Commerce Commission wherein said Commission stated its opinion to be that such contracts were sui generis and that so far as said Commission could see the full performance thereof would not affect any public or private interest adversely, but that said Commission knew of no provision of the law then in force which vested it with any authority or any clause of the law that afforded it a reasonable ground to differentiate

"off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers, the Congress amended, by Act approved June 18, 1910, Section 1 of said Interstate Commerce Act by providing, among other things, that it should apply to telegraph, telephone and cable companies engaged in sending messages from one state, territory or district of the United States to any other state, territory or district of the United States or to any foreign country, and by further providing that the provisions of said Section 1 of said Interstate Commerce Act, requiring that all charges made for any service rendered or to be rendered in the transportation of passengers or property should be just and reasonable and that every unjust and unreasonable charge for such service or any part thereof was prohibited and declared to be unlawful, should apply to the transmission of messages by telegraph, telephone or cable, provided that messages by telegraph, telephone or cable might be classified and different rates charged for the different classes, and by further providing that nothing in said Act should be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.

XVI. That said Interstate Commerce Commission in making its said conference ruling of March 28, 1916, as hereinbefore set
36 out, has misconstrued the purpose and intent of said act approved June 18, 1910, and that said act and the act to which it is an amendment do not justify such ruling or justify the defendant in violating its said contract with your orator; that the purpose of said act and of the act of which it is amendatory is to prohibit and prevent discrimination by common carriers in favor of one shipper or passenger as against other shippers and passengers in like cases, and that all inhibitions and prohibitions thereof are directed to securing equality of service by common carriers, including telegraph companies, for the customers of such common carriers, whether shippers of goods or passengers or transmitters of messages; that the relation of shipper and carrier was not created by said contract "Exhibit A," nor by the terms thereof was or is your orator or the defendant obliged to omit or forego any duty imposed upon your orator or defendant by law, but that by said contract a joint relation in the construction, maintenance and operation of telegraph lines and property was created, such telegraph lines being an indispensable instrumentality for the performance by each of the parties to said contract of the obligations assumed by it in the transactions of its business, and that all such similar contracts, as hereinbefore alleged, create a similar joint relation between the parties thereto for a similar purpose and with a similar result, and that the true intent, meaning and purpose of so much of said act approved June 18, 1910, as permits the making of contracts by telephone, telegraph and cable companies with railroads for the exchange of services, were expressly to permit the continuance of such long established, necessary and existing contracts and the performance by the railroads and the telegraph companies of all their mutual obligations thereunder.

XVII. That in accordance with the provisions of said contract, "Exhibit A," defendant is now lawfully in possession, to the
37 extent therein provided for, of so much of the right of way of your orator as is necessary to accommodate the telegraph lines of defendant, and of hundreds of offices along the entire system of your orator's said railroads; that the rates provided for in said contract to be paid by each of the parties thereto to the other for the services therein required to be rendered by them respectively are essential, exactly balanced and integral parts of said contract, and that any disturbance of the provisions of said contract in that respect would result in a destruction and nullification of said contract in its entirety; that the destruction or nullification of said contract would produce chaos in the business and operations of your orator's said railroad system and would disrupt and disorganize the same, and would prevent the efficient, safe and proper operation of its trains and the proper discharge of its duty to the public, and that for such reasons not only would it be impossible to compensate your orator in damages for the loss that it might sustain by reason of any attempted nullification of said contract, but also it would be impossible to measure or estimate in money what such damages would be; that the refusal of defendant specifically to perform said contract will impose upon your orator the necessity and burden of a great multiplicity of suits for the protection of its rights, in that such refusal will oblige your orator to pay in money for services from time to time rendered by defendant for which by said contract your orator has already rendered full consideration and satisfaction or agreed so to do, and compel your orator to sue defendant for the sum of each such payment or aggregate of payments from time to time during the whole term of said contract; that the defendant's breach of said contract is a continuous breach, and exists from day to day, and that in order for your orator to secure adequate relief it is not only necessary that defendant be enjoined from any further breach of said contract, but that it be required to
38 continue to observe the same in its entirety, and that your orator is, for the reasons aforesaid, without any adequate remedy at law in the premises.

Wherefore, as your orator can have no adequate relief at law, it seeks the aid of this Honorable Court in Equity, where only adequate relief can be administered in matters of this nature, and prays as follows:

1. That this Court will determine, adjudge and decree that said contract, "Exhibit A," is lawful and binding on the parties thereto and is still in full force and effect notwithstanding the conference ruling of March 18, 1916, of said Interstate Commerce Commission and notwithstanding the action of the defendant in respect of such contract or in asserted compliance with such ruling.

2. That this Court will order, adjudge and decree that the defendant, Western Union Telegraph Company, specifically perform said contract, "Exhibit A," your orator being ready, willing and hereby offering specifically to perform said contract in all things on its part and behalf.

3. That this Court will order, adjudge and decree that your orator is entitled to a perpetual injunction herein against the defendant, Western Union Telegraph Company, restraining it from in any manner violating the provisions of said contract, "Exhibit A," which this Court shall require said defendant specifically to perform on its part, and meanwhile and until the final decree of this Court that a temporary injunction be issued against the defendant prohibiting and restraining it from in any manner violating the provisions of said contract, "Exhibit A."

4. That your orator may have such other and further relief in the premises as the nature and circumstances of the case may
39 require and Your Honors may deem just.

5. That the defendant, Western Union Telegraph Company, may be required to answer the several matters and things hereinbefore set forth, but not under oath, answer under oath being hereby expressly waived.

May it please Your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna directed to Western Union Telegraph Company, commanding it, at a certain time and under a certain penalty to be therein specified, to be and appear before this Honorable Court, then and there to answer the allegations of this bill, but not under oath, answer under oath being hereby expressly waived, and to abide by and perform such decree as may be rendered herein; and your orator will ever pray, etc.

THE BALTIMORE & OHIO RAILROAD COMPANY,

By GEO. M. SHRIVER, *Vice-President.*

Attest:

[SEAL.] C. W. WOOLFORD, *Secretary.*

WHITE & CASE,
Solicitors for Complainant.

J. DU PRATT WHITE,
GEORGE F. BROWNELL,
Of Counsel.

40 STATE OF MARYLAND,
City of Baltimore, District of ——, *ss.*

Geo. M. Shriver, being duly sworn, deposes and says that he is an officer, to-wit, the Vice-President of The Baltimore & Ohio Railroad Company, the complainant herein; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations therein contained in respect of the acts of said complainant are true of his own knowledge, and that as to the other matters therein stated he is credibly informed and verily believes them to be true.

GEO. M. SHRIVER.

Sworn to before me, this 8th day of December, 1916.

GEO. W. HAULENBREK,

[SEAL.] *Notary Public.*

My commission expires May 1st, 1918.

41 EXHIBIT A.

This agreement made this 15th day of October, 1887, by and between the Western Union Telegraph Company, hereinafter called the "Telegraph Company," party of the first part, and the Baltimore and Ohio Railroad Company, hereinafter called the "Railroad Company," party of the second part,

Witnesseth:

Whereas an agreement of date of October 5th, 1887, was made between the Telegraph Company and the Railroad Company, under which the Telegraph Company acquired from the Railroad Company certain Telegraph property, rights and interests, and by the terms of which it was agreed that an operating contract should be made between the Railroad Company and the Telegraph Company, covering the telegraph lines on the railroads owned, operated or controlled by the Railroad Company.

Now therefore in order to carry out the said provisions for the execution of an operating contract, it is mutually agreed between the parties hereto as follows:

First. The railroads now owned, operated or controlled by the Baltimore & Ohio Railroad Company, and referred to herein, are shown on Schedule A, hereto attached.

Second. The Telegraph lines specifically covered by this contract are shown on Schedule B and the wires thereon are of two kinds, designated on said Schedule as:

(*a*) Exclusive railroad wires.

(*b*) Commercial wires.

The term "exclusive railroad wires" shall be deemed to include the necessary instruments, switches, local batteries, loops and connections as now located, arranged and used on said wires, and as are necesary to continue in operation, the existing effective telegraph circuits between the several stations and offices of the

42 Railroad Company in the various Cities, Towns and places on the route of the said railroads, and also one wire between Philadelphia and New York City, together with the existing local wires in New York City now connecting the various offices and piers of the Railroad Company as now located and arranged, and as shown in said Schedule B.

Third. The Railroad Company retains the ownership of the "exclusive wires," as above defined.

Fourth. The Telegraph Company agrees to maintain, repair and reconstruct at its cost, in first class condition, all the said telegraph lines and such additional wires as either the Telegraph Company or the Railroad Company may place thereon, the Railroad Company, however, furnishing the necessary unskilled labor for such

maintenance, repairs and reconstruction of said lines and of said additional wires along said railroads; and also furnishing the necessary wire and material (not however including brackets and cross arms) for the maintenance, repair and reconstruction of the "exclusive railroad wires." The term "unskilled labor" shall not include either foremen, linemen, climbers, framers, nor any other laborers who require special skill in connection with telegraph construction and maintenance in order to properly perform the service, but shall include all the labor necessary to dig holes and set, reset and handle poles and other material; nor shall the Railroad Company furnish any tools required in connection with such work.

It is agreed that the location of any of the poles, wires or cables upon the right of way or property of the Railroad Company, shall from time to time, be changed thereon in such manner as the proper officers of the Railroad Company may direct, so as not to interfere with the operations of the Railroad, the Telegraph Company furnishing the skilled labor, and the Railroad Company the unskilled labor for such work.

43 Fifth. It is agreed that the Railroad Company shall have the right from time to time to acquire from the Telegraph Company or to erect necessary additional "exclusive railroad wires" upon and along the telegraph lines of the Telegraph Company named in Schedule B, the Railroad Company paying the cost of the wire, insulators, and other material (not, however, including brackets and cross arms) and the cost of the erection and equipment thereof; it being understood that where such wire acquired or erected is laid in cable in whole or in part, the Railroad Company shall only be charged with the pro rata cost of such conductor or conductors in said cable, as may be set apart for the exclusive use of the Railroad Company, and the pro rata rental of ducts in which the same may be placed. It is agreed however that if the Telegraph Company shall remove its poles and fixtures from any route of said Telegraph lines shown in Schedule B, in any City, Town or place, and re-locate the same in underground conduits or other structures, then the Telegraph Company shall remove the exclusive railroad wires from such poles and fixtures and place the same in such conduits or other structures or substitute new wires therefor in such conduits or other structures, the Railroad Company paying the cost of removing such wires and placing the same in said conduits or other structures, or the cost of such new wires and the pro rata rental of said conduits or other structure or the pro rata cost of construction thereof.

The Railroad Company shall not be required however to furnish any unskilled labor for maintenance, renewal, or reconstruction of any part of said telegraph lines not upon or along or adjacent to its right of way. And the Telegraph Company shall, upon the request of the Railroad Company connect by overhead wires the present "exclusive railroad wires," and such as may be hereafter acquired or erected as herein provided, with additional offices, stations and

44 buildings of the Railroad Company, in the several Cities and Towns on the route of said railroads, and also in the Cities of New York and Brooklyn, if and so long as the Telegraph Company

shall have poles or house top fixtures available for reaching such additional offices, stations and buildings, and the Railroad Company agrees to pay the cost of the wire, insulators and other material and the cost of the erection and equipment thereof; and also to pay any bridge and house top or fixture rentals which the Telegraph Company may have to pay for such wires. It being understood that in cases where it may be necessary to use aerial cables in the acquisition or erection of such additional wires and connections the Railroad Company shall only be charged with pro rata cost of such conductor in said aerial cable or cables as may be set apart for the exclusive use of the Railroad Company.

If the Telegraph Company shall have an underground conduit available for reaching the Railroad Company's offices, stations and buildings in any such town, City or place, the Telegraph Company will furnish the Railroad Company such connecting wires as the Telegraph Company may be able to supply in the said conduit or conduits used by it, the Railroad Company hereby agreeing to pay to the Telegraph Company the entire cost of the wire and of placing the same in the conduit, and the pro rata cost of construction or rental and maintenance of such conduit or conduits.

Sixth. The Telegraph Company shall furnish, free of cost, the use of its main batteries for the efficient operation of all railroad wires and also all instruments, local batteries, stationery and other material for commercial business, and hereby grants to the Railroad Company for use, upon the railroad wires, the free use of all telegraphic patents, which the Telegraph Company or its subordinate Companies, now, or hereafter own, or own and use for the general telegraph business; but this grant shall not require the Telegraph Company to make any payments on account of such free use to any minority interests in such subordinate Companies, but any such payments to minority interests shall be chargeable to the Railroad Company.

It is understood and agreed that the Railroad Company shall furnish all instruments, local batteries, stationery and other material for railroad business.

Seventh. The Railroad wires shall be used only by the Railroad Company for its railroad business, and shall not be used for the transmission of any commercial or public telegraph business, for tolls, except as hereinafter set forth. It is agreed, however, that where there is but one wire, as shown on said Schedule B., it may be used jointly by the Telegraph Company with the Railroad Company, important railroad messages, directing the movement of trains, having precedence, until such time as in the judgment of the President of the Railroad Company such joint use may be detrimental to the business of the Railroad Company, and in such case the Telegraph Company shall erect an additional wire for commercial business. In all other cases the railroad wires may from time to time be used by the Telegraph Company jointly with the Railroad Company with the Railroad Company's assent, when not in use for railroad business.

Whenever the railroad wires have become disabled the Railroad Company shall have the right to take and use jointly with the Tele-

graph Company any of the working commercial wires for the purpose of moving its trains or transacting other important and urgent railroad business, such use to continue without cost to the Railroad Company until the repair of the railroad wires has been effected and the circuits restored.

But the through commercial wires or circuits shall not be subject to such use by the Railroad Company, except in cases of extreme emergency.

Eighth. Either party to this agreement may establish and maintain telegraph stations at such places on said railroads as it may deem necessary.

46 At all telegraph stations of the Railroad Company, it shall furnish operators at its own expense; and its operators and other employees acting as agents of the Telegraph Company, shall receive, transmit, and deliver exclusively for the Telegraph Company, such commercial or public messages as may be offered, and shall charge the tariff rates of the Telegraph Company thereon, and shall render to the Telegraph Company exclusively, monthly statements of such business and full accounts of all receipts therefrom, and shall pay all of such receipts to the Telegraph Company in such manner and at such times as it may direct, but it is understood that in the transaction of all such telegraph business said operators and all other employees shall be held to be only the agents of the Telegraph Company, and shall conform to all rules, regulations and orders of the Telegraph Company applicable to all telegraph business, whether paid or free.

And said operators and other employes shall not, without the consent of the Telegraph Company transmit over the Telegraph lines covered by this agreement, any free messages except those herein provided for.

Whenever the number of paid and collect messages sent from any railroad office amounts to 3,000 or more in any one year, (30 words of press matter sent being counted as one message) the Telegraph Company shall thereafter provide an operator for such office, so long as said messages amount to said number, and said operator acting as the agent of the Railroad Company shall attend to the telegraph business of the Railroad Company without charge, so long as one operator can attend to the telegraph business of both parties. No employee of the Railroad Company shall while in its service be employed in the transaction of commercial or public telegraph business by or for any party other than the Telegraph Company; and the Telegraph Company shall have the exclusive right to the occupancy of the Railroad Company's depots and station houses for commercial or

47 public telegraph business as against any other party.

Ninth. If the Telegraph Company elects to establish an office in a station building of the Railroad Company the Railroad Company shall, if it can conveniently furnish the space therefor, provide office room in such building and light and fuel thereof, free of charge, and if at such station one person can attend to the telegraph business of both Companies, the operator of the Telegraph Company at such office, acting as the agent of the Railroad Company, shall attend to

the telegraph business of the Railroad Company without charge, and shall conform to all the rules and regulations of the Railroad Company applicable thereto.

Whenever the telegraph business of both Companies at any office where the Telegraph Company furnishes the operator becomes so large as to require more than one operator, then the Railroad Company shall employ and pay its own operator.

Tenth. The Telegraph Company shall receive and transmit over the said lines along said railroads, in the order in which they and other messages shall be filed with it, and shall deliver, with promptness and despatch, and free of charge, the messages of the officers and agents of the Railroad Company pertaining to its railroad business between all Cities, Towns and places now reached by said telegraph lines on said railroads.

And it is expressly agreed that such messages shall be received at and delivered from any of the offices of the Telegraph Company or its subordinate Companies in any of the said Cities, Towns and places and when so received shall be transmitted by the Telegraph Company over said telegraph lines free of charge. And if the same for any reason of convenience to the Telegraph Company shall be transmitted by other lines to the place of destination, no charge shall be made therefor.

The Telegraph Company agrees to issue to such officers of
48 the Railroad Company, as may be designated by the President or other authorized officer thereof, annual franks authorizing the free transmission of messages relating strictly to the railroad business of the Railroad Company's railroads covered by this agreement, originating at and destined to points on the lines now or hereafter owned or operated by the Telegraph Company, or its subordinate Companies, in the Telegraph Company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding ten thousand dollars ($10,000.00) per annum calculated at the regular commercial day rates of the Telegraph Company between the points at which such messages originate and the points to which they may be destined. And the Railroad Company agrees to pay to the Telegraph Company one half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the Railroad Company's railroads covered by this agreement, and shall not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodation for customers of the Railroad Company, the tolls on which messages should properly be chargeable to such customers.

Eleventh. The Railroad Company agrees to transport, free of charge over its said railroads, on application of the Superintendent or other proper officer of the Telegraph Company, all employees of the Telegraph Company when traveling on its business or engaged in its work along said railroads; and to likewise transport and dis-

tribute free of charge, all poles and other material and supplies of the Telegraph Company, for the construction, maintenance, renewal and reconstruction of the said telegraph lines named on Schedule B, along said railroads, and of such additional wires as may be
49 erected on said telegraph lines, and of the lines and wires hereinafter provided for, on extensions, branches and acquired roads, and also material and supplies for the establishment, maintenance, and operation of the officers of both parties hereto upon said telegraph lines at places along said railroads.

And the Railroad Company also agrees to transport, free of charge, the employes of the Telegraph Company when traveling on its business, or engaged in its work, and the poles and other material and supplies of the Telegraph Company, required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the Telegraph Company than those hereinbefore named whether on or off the line of said railroads, to an amount not exceeding ten thousand ($10,000.00) per annum, calculated at the current transportation rates of the Railroad Company; and the Telegraph Company agrees to pay to the Railroad Company one half of its aforesaid rates on all such transportation of employes and poles and other material in excess of said amount. Settlements to be made yearly.

Twelfth. The Telegraph Company agrees to pay to the Railroad Company the sum of sixty thousand dollars per annum, in equal instalments of five thousand dollars at the close of each month, during the continuance of this agreement, accounting from October 15th, 1887.

Thirteenth. It is a condition of this contract that the Railroad Company is not to be responsible for, and the Telegraph Company covenants and agrees to save the Railroad Company harmless and indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Company, while being carried free or at half rates over said railroads under this agreement, whether such loss or damage arise from the neglect of said Railroad Company or its em-
50 ployes or otherwise, and shall likewise indemnify and save harmless the Railroad Company from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business; and the Telegraph Company shall not be responsible for and the Railroad Company agrees to indemnify and save it harmless against any loss or damages of any kind arising from or on account of any error or failure, delay or default in the transmission or delivery of any and all messages sent for the Railroad Company under this agreement.

Fourteenth. Neither the general terms of this agreement nor any stipulation contained herein shall have the effect of creating a covenant of quiet enjoyment, either expressed or implied, on the part of the Railroad Company, and in favor of the Telegraph Company, as against the owner of the fee simple of the land over which the Railroad Company or of any of its subordinate Companies, has the right of way. Nor as against the exercise of the power of eminent domain

on the part of any other Companies possessing it by grant from any state, or of the United States.

And it is further agreed that if anything herein contracted to be done, or not to be done shall be held to be invalid for want of corporate or legal authority to make an agreement to such an extent, it shall not give to either party any claim for damages by reason of any excess or defect of corporate or legal authority in so doing.

Fifteenth. Should the Railroad Company build new extensions or branches or acquire other railroads by purchase, lease, ownership of stock, or otherwise, then the provisions of this contract shall apply thereto and to the telegraph lines thereon, to the same extent as if such telegraph lines and railroads had been included in said Schedule- A. and B.; and if there be no telegraph line on such roads then the Telegraph Company shall furnish material and construct
51 one thereon, and maintain, repair and reconstruct the same, the Railroad Company hereby agreeing to furnish the unskilled labor for such construction, maintenance, repair and reconstruction, of such line, and of such additional wires as may be erected thereon; and the Telegraph Company will set apart thereon for the Railroad Company's railroad business one exclusive railroad wire. If there be a telegraph line owned, leased or controlled by the Telegraph Company already erected on any such road then there shall be set apart for the use of the Railroad Company such "exclusive railroad wire or wires" thereon as may have been previously used for railroad business exclusively.

If the Railroad Company shall acquire a telegraph line on any such road, the Railroad Company agrees to sell and the Telegraph Company agrees to purchase, such telegraph line at a valuation to be agreed upon, based on the cost of constructing and equipping a similar line, less the cost of unskilled labor, with a proper deduction for decreased value of the material and equipment of the line as compared with new material and equipment.

If the parties hereto cannot agree upon such valuation, the same shall be fixed by arbitrators to be appointed in the manner hereinafter provided.

Upon all such extensions, branches, and leased, controlled or hereafter acquired roads, the Railroad Company shall be entitled to free telegraphic service to the same extent and in the same manner as provided by the first clause of Article 10 hereof on said existing railroads, and the ten thousand dollar per year limit of free telegraphic service, as provided by the second clause of said Article 10, shall be increased six dollars per annum for each mile of such road occupied by the Telegraph Company's lines upon such extensions, branches, leased, controlled, or hereafter acquired roads; and the Telegraph Company shall be entitled to free transportation service for employees, poles and other material and supplies to the same extent for use thereon, and in the same manner as provided by
52 the first clause of Article 11 hereof; and the ten thousand dollar per annum limit for free transportation provided for by the second clause of Article 11 shall be increased six dollars per annum per mile of such road occupied as aforesaid.

Sixteenth. The Railroad Company so far as it lawfully may hereby grants and covenants and agrees to assure to the Telegraph Company the exclusive right of way on, along and under the lands, roads and bridges, of the Railroad Company, and any extensions and branches thereof, and any leased, operated or controlled roads, and the full and exclusive use and enjoyment thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to erect from time to time such additional wires upon the said existing lines of poles and any renewals thereof upon said railroads, and also the right to construct one additional line of poles and wires or an underground line upon, along or under said railroads, as the Telegraph Company may deem expedient, but the location of any such additional line of poles and wires, or underground structures, shall be made in such way as not to interfere with the operations of the Railroad Company, and at such places on the right of way or lands of the Railroad Company as shall be designated by the proper officer of the Railroad Company. And the Railroad Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, as far as the Railroad Company legally may.

And the Railroad Company will not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or other telegraph or telephone line in competition with the lines or business of the Telegraph Company, except at and for the Railroad Company's current local rates;
53 nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations, so far as such refusal and limitation of transportation may be lawful; provided, always that in protecting and defending the exclusive grants herein conveyed the Telegraph Company may use or proceed in the name of the Railroad Company or of any subordinate Company whose road or property may be owned, leased or controlled by the Railroad Company, but shall indemnify and save harmless the Railroad Company from any and all damages, cost, charges and legal expenses incurred therein or thereby.

But this contract shall not be held to require the Railroad Company to furnish unskilled labor for the construction, maintenance, removal or reconstruction of any other than said existing telegraph lines and renewals thereof upon said railroads, and the additional wires that may be placed thereon and the lines hereinbefore provided for on extensions, branches and acquired roads.

Seventeenth. The term "Subordinate Companies" as used in this contract, shall be deemed to include all Companies controlled by ownership of stock, lease, contract for operation or in any other manner by either of the parties hereto.

And the term "telegraph line" or "telegraph lines" shall be deemed to include the line of poles, wires, cable and cables thereon,

batteries connected therewith, and other devices necessary for their efficient telegraphic operation.

Eighteenth. It is mutually understood and agreed that the telegraph lines, poles, wires and fixtures covered by this contract, shall form part of the general telegraphic system of the Telegraph Company and shall be controlled and regulated by the Telegraph Company, which shall fix and determine all tariffs for the transmission of messages and all connections with other lines and interests.

And the Railroad Company expressly agrees that no wire
54 now or hereafter owned, leased, controlled or used by it, shall at any time be used or employed directly or indirectly in competition with the Telegraph Company, or by or for any party other than the Railroad Company and the Telegraph Company, and the Railroad Company will not at any time during the continuance of this agreement engage in or transact any commercial or public telegraph business excepting for the Telegraph Company under the provisions of this agreement.

Nineteenth. It is agreed that the management and control of the railroad employes so far as engaged in telegraphic duties upon said railroads and of employes of the Telegraph Company engaged in the maintenance, repair, renewal or reconstruction of said telegraph lines along said railroads, and the distribution of men, material and supplies therefor, shall be vested in a competent joint Superintendent of telegraph who shall be appointed and whose salary shall be fixed by the Railroad Company, with the approval of the Telegraph Company; and the salary of said joint Superintendent shall be paid equally by the Railroad and Telegraph Company and said joint Superintendent shall be removable for cause by either party and shall be subordinate to and under the control of the Telegraph Company, so far as necessary to enforce said Company's rules, regulations and orders regarding the maintenance, repair, removal or reconstruction, operation, management and arrangement of said Company's lines, and the transaction of the commercial telegraph business upon said railroads; and said Joint Superintendent shall decide upon the number of linemen to be employed for ordinary repairs and the places at which they shall be stationed after consultation with both parties hereto; and he shall also be subordinate to and under the control of the Railroad Company so far as necessary to enforce said Company's rules, regulations and orders regarding the maintenance, management, arrangement and operation of said
55 Company's exclusive railroad wires. It being understood and agreed that he shall co-operate with both parties hereto in giving the utmost efficiency to the working of all lines upon said railroads and the proper transaction of the railroad and commercial telegraph business thereon.

The Railroad Company shall furnish office room and light and fuel therefor for said Joint Superintendent and each party shall supply clerical force for its own business.

Twentieth. In case of any disagreement between the parties hereto concerning the meaning of any of the provisions of this agreement or the operations hereunder, such difference shall be referred to three

arbitrators, one to be chosen by each party and the third to be selected by the two thus chosen. And the decision of a majority of such arbitrators shall be final and conclusive upon the parties. In case either party neglects for the period of thirty (30) days to appoint an arbitrator after delivery to it of written notice by the other party, the party not in such default may appoint such arbitrator, and the two thus selected may choose a third, and the decision of a majority of the three thus chosen shall be final and conclusive.

Twenty-first. The execution of this agreement shall terminate all previous agreements now existing or which may be claimed to exist between the parties hereto, or their predecessors or their sub Companies respectively, in the ownership or control of their properties respectively, and covering the construction, maintenance or operation of telegraph lines along the railroads or any of them covered by this agreement; and this agreement shall continue in force for the term of fifty (50) years from October 15th, 1887; and may be renewed after the expiration of said term for further terms of fifty (50) years each by either party giving written notice to the other to that effect at least six months prior to the expiration of the first and each successive period of fifty years. A violation of any
56 of the provisions of this agreement by either party while entitling the other to a claim for damages and the usual remedies for specific enforcement shall not be held to void this agreement or to abrogate the obligations or the undertakings of either party hereto.

In witness whereof the parties to these presents have caused the names of their proper officers to be hereunto subscribed and their corporate seals to be attested the day and year first above written.

THE WESTERN UNION TELEGRAPH COMPANY.

(Signed) By JNO. VAN HORNE,
[SEAL.] *Vice President.*

(Signed) A. R. BREWER, *Secretary.*

THE BALTIMORE AND OHIO RAILROAD COMPANY.

(Signed) By S. SPENCER,
[SEAL.] *President.*

(Signed) ANDREW ANDERSON, *Secretary.*

SCHEDULE "A."

List of Railroads Owned, Operated, or Controlled by the Baltimore and Ohio Railroad Company.

Philadelphia Division.

Comprising the following lines:

Philadelphia Branch, Baltimore to State line between Delaware and Maryland.

Baltimore and Philadelphia Railroad from State line between Maryland and Delaware to Philadelphia.

Landenburg Branch from Wilmington, Delaware to Landenburg, Penn.

Schuylkill River East Side Railroad in the City of Philadelphia with Branch line to Delaware River.

57 Main line and Branches east of the Ohio River as follows:

Main line Baltimore to Wheeling.

Washington Branch, Relay, Maryland to Washington, D. C.

Curtis Bay Branch, Baltimore to Curtis Bay.

Alexandria Branch, Alexandria Junction to Sheppards.

Metropolitan Branch, Washington, D. C. to Washington Junction, Maryland.

Frederick Branch, Frederick Junction to Frederick, Maryland.

Washington County Railroad, Weverton, Maryland, to Hagerstown, Maryland.

South Branch Railroad, Green Spring to Romney, West Virginia.

Parkersburg Branch Railroad, Grafton to Parkersburg, W. Va.

Fairmont, Morgantown and Pittsburgh Railroad, Fairmont to Morgantown.

Pittsburgh Division—Cumberland, Maryland, to Pittsburgh, Penn.

Salisbury Railroad, Salisbury Junction to West Salisbury, Penn.

Short Line Railroad, O. and B. Junction to Trotter's, Penn.

Hickman Run Branch, Hickman to Cora, Penn.

Somerset and Cambria Railroad, Rockwood to Johnstown, Penn.

Berlin Branch, Berlin to Garrett, Penn.

Fayette County Branch, Cromwell to Uniontown.

Mount Pleasant Branch, Broad Ford to Mount Pleasant, Penn.

Wheeling, Pittsburgh and Baltimore Railroad, Glenwood, Penn., to Wheeling, West Virginia.

Harpers Ferry and Valley Branch Division.

Winchester and Potomac Railroad, Harpers Ferry to Winchester.

58 Winchester and Strasburg Railroad, Winchester to Strasburg.

Harrisonburg and Strasburg Railroad (leased line of Va. Mid.) Strasburg to Harrisonburg.

Trans-Ohio Divisions.

Central Ohio Railroad, Columbus to Bellaire, Ohio.

Sandusky, Mansfield and Newark Railroad, Sandusky to Newark, O.

Newark, Somerset and Straitsville Railroad Newark to Shawnee, Ohio.

Baltimore and Ohio and Chicago Railroads, Chicago Junction to Chicago, Illinois.

59 *Answer.*

District Court of the United States, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Answer.

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

Defendant The Western Union Telegraph Company now comes and for answer to the bill of complaint to The Baltimore & Ohio Railroad Company, says:

1. Defendant admits the allegations of paragraphs 1, 2, 3 and 4 of said bill of complaint.

2. Defendant admits the allegations of paragraph 5 of said bill of complaint and the making of the said contract Exhibit A, portions of which are set forth in said paragraph 5, but for the full force, meaning and effect of said contract defendant refers to said contract, a copy of which is attached to said bill of complaint marked Exhibit "A."

3. Defendant admits the allegations of paragraphs 6, 7 and 8 of said bill of complaint.

60 4. Defendant admits the allegations of paragraph 9 of said complaint, and defendant further says, with respect to said ruling of said Commission, that the telegraph system of defendant consists of many thousands of miles of pole lines and wires, and is in a very large part made up of lines of telegraph constructed under and in accordance with approximately thirteen hundred (1300) contracts with approximately three hundred different railroads and railroad systems throughout the United States, said contracts being in substance similar in the underlying provisions to the contract set forth in the bill of complaint herein; and that by reason thereof a very large part of defendant's business is dependent upon such contracts and is carried on in railroad offices, manned by telegraph operators employed by the railroad companies along the lines of said roads.

That defendant, upon the making of the ruling of the Interstate Commerce Commission originally under date of July 15th, 1914, and later reaffirmed under date of March 28th, 1916, in view of the many and severe penalties which would attach should that Commission's interpretation of the Interstate Commerce Act as applied to this defendant be sustained, felt compelled and now feels compelled to adopt and apply the same (although advised that it is doubtful whether such construction of said Act is correct), not only with respect to its operations and dealings under the contract between com-

plainant and defendant as set forth in said bill of complaint, but also with respect to its operations and dealings with all the other railroad companies and systems under the contracts above set forth, all of which contracts as stated in said bill of complaint have been filed by the railroad companies with the Interstate Commerce Commission.

5. Defendant admits the allegations of the 10th, 11th, 12th, 13th, 14th, 15th and 16th paragraphs of said bill of complaint.

61 6. Defendant admits the allegation of the 17th paragraph of said bill of complaint, and says that defendant is willing to carry out said contract between complainant and defendant as it was entered into, but has felt compelled to refuse to carry out the same in the particulars named in said bill of complaint by reason of the ruling of said Interstate Commerce Commission set forth in said bill of complaint, with respect to the limitation upon the right of plaintiff and defendant to enter into contracts for the exchange of services.

Wherefore, defendant asks that this Court determine the rights and obligations of complainant and defendant respectively under the provisions of said contract and under and in accordance with the provisions of the Interstate Commerce Act, and that defendant may have such other and further relief in the premises as the nature and circumstances of the case may require and your Honors may deem just, and defendant will ever pray, etc.

THE WESTERN UNION TELEGRAPH COMPANY.
By RUSH TAGGART, *Vice-President.*

Attest:
ANDREW F. BURLEIGH, *Secretary.*

62 *Decree.*

At a Term of the District Court of the United States within and for the Southern District of New York, in the Second Judicial Circuit, in the Borough of Manhattan, City and State of New York, on the 28th Day of February, 1917.

Present: Hon. Julius M. Mayer, District Judge.

In Equity.

No. 14–45.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,
against
WESTERN UNION TELEGRAPH COMPANY, Defendant.

Decree.

This cause came on to be heard at this Term and was argued by counsel; thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed as follows, viz:

1. That a certain contract or agreement, made October 15, 1887, by and between the Western Union Telegraph Company, of the first part, and The Baltimore & Ohio Railroad Company, of the second part, copy of which contract or agreement is annexed
63 to and forms part of the Bill of Complaint herein, is lawful and binding upon the parties thereto, and is still in full force and effect notwithstanding the Conference Ruling of March 28, 1916 of the Interstate Commerce Commission, and notwithstanding the action of the defendant herein in respect of such contract or agreement or in asserted compliance which such Ruling.

2. That said Defendant, Western Union Telegraph Company, specifically perform the said contract or agreement of October 15, 1887, between it and said The Baltimore & Ohio Railroad Company, in all respects.

3. That said Defendant, Western Union Telegraph Company, be and it hereby is perpetually enjoined and restrained from in any manner violating the provisions of said contract or agreement dated October 15, 1887, between it and said The Baltimore & Ohio Railroad Company.

4. That the Complainant have costs of this action to be taxed.

Dated, New York, February 28, 1917.

JULIUS M. MAYER,
United States District Judge.

64 *Opinion.*

United States District Court, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

against

WESTERN UNION TELEGRAPH COMPANY, Defendant.

J. Du Pratt White, George F. Brownell and Vermont Hatch, all of New York City, for plaintiff.

Rush Taggart, of New York City, for defendant.

Joseph W. Folk and Otis W. Kent, of Washington, D. C., for Interstate Commerce Commission, amicus curiæ.

The cause having come up on bill and answer, plaintiff seeks a decree adjudging that (1) a certain contract between the parties is lawful and in full force and effect; (2) defendant specifically perform the contract, and (3) plaintiff have an injunction against defendant restraining it from violating the provisions of the contract.

On October 15, 1887, the parties entered into the written contract here under consideration. (The numbers hereinafter
65 refer to paragraphs of the contract.)

The Contract.

(1) Enumerated by reference to a schedule the railroads owned by plaintiff (hereinafter called Railroad).

(2) Enumerated by reference to a schedule the (*a*) exclusive railroad wires and (*b*) commercial wires of defendant (hereinafter called Telegraph Co.) and provided that "exclusive railroad wires," should be deemed to include the necessary instruments and connections, as then located and used on said wires and as necessary to continue in operation the existing effective telegraphic circuits between the several stations and offices of the Railroad in the various places on the routes of the railroads then owned, leased, operated or controlled by the Railroad, etc.

(3) The Railroad was to retain the ownership of said "exclusive railroad wires."

(4) The Telegraph Co. agreed to maintain, repair and construct, at its own cost, all the telegraph lines specifically covered by said contract and such additional wires as either the Telegraph Co. or the Railroad might place thereon, the Railroad, however, to furnish the necessary unskilled labor for such maintenance, repairs and reconstruction and the necessary wire and material, not including brackets and cross-arms, for the maintenance, repair and reconstruction of the "exclusive railroad wires"; the location of any poles, wires or cables upon the right of way or property of the Railroad should, from time to time, be changed thereon in such manner as the officers of the Railroad might direct, so as not to interfere with the operations of the railroad, the Telegraph Co. furnishing the skilled labor and the Railroad the unskilled labor for such work.

(5) The Railroad should have the right to acquire from the Telegraph Co., or to erect, additional "exclusive railroad
66 wires" upon the telegraph lines covered by the contract, the Railroad paying the cost of material, not including brackets and cross-arms, and of direction and equipment, etc.; the Railroad should not be required to furnish any labor in connection with lines not upon its right of way and the Telegraph Co. should connect the "exclusive railroad wires" with additional offices, stations and buildings of the Railroad in the cities and towns along its route, and also in the Cities of New York and Brooklyn, where the Telegraph Co. had facilities therefor, and if the Telegraph Co. should have underground conduits available for reaching the Railroad's offices, stations and buildings, the Telegraph Co. should furnish the Railroad such connecting wires as it might be able to supply in said conduits upon payment by the Railroad of the entire cost of the wire and of placing the same in the conduits and the pro rata cost of construction or rental and maintenance of the conduits.

(6) The Telegraph Co. should furnish free of cost the use of its main batteries for the efficient operation of all railroad wires and also all instruments, stationery and other material for commercial business, and should grant to the Railroad for use upon the railroad wires the free use of all telegraphic patents then or thereafter

owned or used by the Telegraph Co. or its subordinate companies, for the general telegraph business, except that any payments which the Telegraph Co. might be required to make on account of such free use to any minority interests in subordinate companies should be charged to the Railroad and the Railroad should furnish all instruments, stationery and other material for railroad business.

(7) The railroad wires should be used only by the Railroad for its railroad business and should not be used for the transmission of any commercial or public telegraph business for tolls except
67 that where there was but one wire it might be used jointly by the Telegraph Co. with the Railroad, important railroad messages directing the movement of trains having precedence, until such time as in the judgment of the President of the Railroad such joint use might be detrimental to the business of the Railroad, whereupon the Telegraph Co. should erect an additional wire for commercial business; that in all other cases the railroad wires might be used from time to time by the Telegraph Co. jointly with the Railroad, with the Railroad's assent, when not in use for railroad business; that whenever the railroad wires should become disabled the Railroad should have the right to take and use jointly with the Telegraph Co. any of the working commercial wires for the purpose of moving its trains or transacting other important and urgent railroad business, such use to continue without cost to the Railroad until the repair of the railroad wires had been effected and the circuits restored, but that the through commercial wires or circuits should not be subject to such use by the Railroad except in cases of extreme emergency.

(8) Either party might establish and maintain telegraph stations at such places on said railroads as it might deem necessary; at all telegraph stations of the Railroad it should furnish operators at its own expense; its operators and other employees acting as agents of the Telegraph Co. should receive, transmit and deliver exclusively for the Telegraph Co. such commercial or public messages as might be offered and should charge the tariff rates of the Telegraph Co. thereon, and should render to the Telegraph Co. exclusively monthly statements of such business and full accounts of all receipts therefrom, and pay all of such receipts to the Telegraph Co. but in the transaction of all such telegraph business said operators and all other employees should be held to be only the agents of the Telegraph Co. and should conform to all rules and regulations
68 of the Telegraph Co. applicable to all telegraph business, whether paid or free, and should not, without the consent of the Telegraph Co. transmit over the lines covered by said contract, any free messages except those therein provided for; whenever the number of paid and collect messages sent from any railroad office should amount to $3,000 or more in any one year, the Telegraph Co. should thereafter provide an operator for such office so long as said messages amounted to said number, and said operator, acting as the agent of the Railroad, should attend to the telegraph business of the Railroad without charge so long as one operator

could attend to the telegraph business of both parties; no employee of the Railroad should while in its service be employed in the transaction of commercial or public telegraph business for any party other than the Telegraph Co. and the Telegraph Co. should have the exclusive right to the occupancy of the Railroad's depots and station houses for commercial or telegraph business as against any other party.

(9) If the Telegraph Co. should elect to establish an office in a station building of the Railroad, the latter should, if convenient, provide office room therein and light and fuel therefor, free of charge, and if at such station one person could attend to the telegraph business of both companies, the operator of the Telegraph Co. at such office, acting as agent for the Railroad, should attend to the telegraph business of the Railroad without charge and conform to the rules of the Railroad applicable thereto; whenever the telegraph business of both companies at any office where the Telegraph Co. furnished the operator should become so large as to require more than one operator, the Railroad should employ and pay its own operator.

(10) The Telegraph Co. should receive and transmit from said lines along said railroads, and should deliver free of charge
69 the messages of the officers and agents of the Railroad pertaining to its railroad business, between all places then reached by said telegraph lines on said railroads; such messages should be received at and delivered from any of the offices of the Telegraph Co. or its subordinate companies in any of said places, and when so received should be transmitted by the Telegraph Co. over said telegraph lines free of charge; the Telegraph Co. should issue to officers of the Railroad annual franks authorizing the free transmission of messages relating strictly to railroad business of the Railroad originating at and destined to points on the lines then or thereafter owned or operated by the Telegraph Co. or its subordinate companies in the Telegraph Co.'s general telegraph system beyond or off the lines of said railroads, to an amount not exceeding $10,000 per annum, calculated at the regular day rates of the Telegraph Co. between the points at which said messages should originate and the points to which they might be destined; the Railroad should pay to the Telegraph Co. one-half of its aforesaid rates on all such messages in excess of said amount, settlements to be made yearly; the free telegraphic service provided for in said contract should apply only to the transmission of messages concerning the operation and business of the Railroad's railroads covered by said contract, and should not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise or accommodations for customers of the Railroad, the tolls on which messages should properly be chargeable to such customers.

(11) The Railroad should transport free of charge over its railroads, on application of the Telegraph Co., all employees of the latter when traveling on its business or engaged in its work along said railroads, and transport and distribute free of charge all poles

70 and other material and supplies of the Telegraph Co., for the construction, maintenance, renewal and reconstruction of said telegraph lines covered by said contract, along said railroads, and also all material and supplies for the establishment, maintenance and operation of the offices of both parties to said contract upon said telegraph lines at places along said railroads; that the Railroad should transport free of charge the employees of the Telegraph Co. when traveling on its business or engaged in its work, and the materials and supplies of the Telegraph Co. required for the construction, maintenance, renewals and reconstruction of other telegraph lines of the Telegraph Co. other than those above referred to, whether on or off the lines of said railroads, to an amount not exceeding $10,000 per annum, calculated at the current transportation rates of the railroad, and the Telegraph Co. should pay to the Railroad one-half of its aforesaid rates on all such transportation of employees and material in excess of said amount, settlements to be made yearly.

(12) The Telegraph Co. should pay to the Railroad the sum of $60,000 per annum, in equal installments of $5,000 at the close of each month during the continuance of the contract, accounting from October 15, 1887.

(13) The Railroad should not be responsible for and the Telegraph Co. should indemnify it against any loss or damages of any kind arising from any injury to persons in the employ of or property belonging to the Telegraph Co. while being carried free or at half rates over said railroads under said contract, and should likewise indemnify the Railroad from any neglect or failure in the transmission or delivery of messages for any person doing business with the Telegraph Co. and on account of any other public telegraph business, and the Telegraph Co. should not be responsible for and the Railroad should indemnify against any loss or damages of

71 any kind arising from or on account of any error or default in the transmission or delivery of any and all messages sent for the Railroad under said contract. * * *

(15) The provisions of said contract should apply to any new extensions or branches built or other railroads acquired by the Railroad, and to the telegraph lines thereon, to the same extent as if such lines and railroads had been originally included in said contract, and if there should be no telegraph line on any such roads, then the Telegraph Co. should furnish material and construct one thereon and maintain, repair and reconstruct the same, the Railroad furnishing the unskilled labor therefor; the Telegraph Co. should set apart on any such railroads, for the Railroad's business, one exclusive railroad wire; if the Railroad should acquire a telegraph line on any such road, the Railroad should sell and the Telegraph Co. should purchase such telegraph line on a valuation to be agreed upon; upon all such extensions, branches and leased, controlled or thereafter acquired roads, the Railroad should be entitled to free telegraphic service to the same extent and in the same manner as provided by the first clause of paragraph Tenth of the contract on the railroads originally covered by said contract, and the $10,000 per year limit

of free telegraphic service, as provided by the second clause of paragraph Tenth, should be increased $6 per annum for each mile of such road occupied by the Telegraph Co.'s lines upon such extensions, branches, leased, controlled or thereafter acquired roads; the Telegraph Co. should be entitled to free transportation service for employees and material to the same extent, for use thereon and in the same manner as provided by the first clause of paragraph Eleventh of said contract, and the $10,000 per annum limit for free transportation provided for by the second clause of said paragraph
72 Eleventh should be increased $6 per annum per mile of such road occupied as aforesaid.

(16) The Railroad granted and agreed to assure to the Telegraph Co. the exclusive right of way, on, along and under the lands, roads and bridges of the Railroad and any extensions and branches and any leased, operated or controlled roads, and the full and exclusive use and enjoyment thereof, for the construction, maintenance, operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business; the Railroad would clear and keep clear said right of way of obstructions to the construction and maintenance of the lines and wires provided for in said contract; the Railroad would not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires or underground or any telegraph or telephone line in competition with the lines or business of the Telegraph Co. except for the Railroad's current legal rates, nor would it furnish for any competing line any facilities or assistance that it might lawfully withhold, nor stop its trains nor distribute its material therefor at other than regular stations, so far as such refusal and limitation of transportation might be lawful, but that the Railroad should not be required to furnish unskilled labor for the construction, maintenance, removal or reconstruction of any other than the telegraph lines then existing and renewals thereof, upon said railroads and the additional wires that might be placed thereon and the lines provided for on extensions, branches and acquired roads. * * *

(18) The telegraph lines covered by said contract should form part of the general telegraphic system of the Telegraph Company and be controlled and regulated by it, and it should fix and determine all tariffs for the transmission of messages and of
73 connections with other lines and interests; no wire then or thereafter owned, leased, controlled, or used by the Railroad should at any time be used or employed directly or indirectly in competition with the Telegraph Co. by or for any party other than the Railroad and the Telegraph Co. and the Railroad should not at any time during the continuance of the contract engage in or transact any commercial or public telegraph business excepting for the Telegraph Co. under the provisions of the contract.

(19) The management and control of the railroad employees, so far as engaged in telegraphic duties upon said railroads, and of the employees of the Telegraph Co. engaged in the maintenance, repair, renewal and reconstruction of said telegraph lines along said railroads and the transportation of men, material and supplies therefor,

should be vested in a competent joint superintendent of telegraph, who should be appointed and whose salary should be fixed by the Railroad, with the approval of the Telegraph Co., which salary should be paid equally by the Railroad and the Telegraph Co.; that said joint superintendent should be removable for cause by either party and should be subordinate to and under the control of the Telegraph Co. so far as necessary to enforce its rules, regarding the maintenance, repair, renewal or reconstruction, operation, management and arrangement of its lines, and the transaction of the commercial telegraph business upon said railroad; said joint superintendent should also be subordinate to and under the control of the Railroad so far as necessary to enforce its rules, regarding the maintenance, management and operation of its exclusive railroad wires, and that he should cooperate with both parties in giving the utmost efficiency to the working of all lines upon said railroads and the proper transaction of the railroad and commercial telegraph business thereon, and that the Railroad should furnish office room and
74 light and fuel therefor for said joint superintendent and that each party should supply the clerical force for its own business.

(20) * * *

(21) Said contract should terminate all previous agreements between the parties, should continue in force for fifty years from October 15, 1887, and might be renewed after the expiration of such term for further terms of fifty years each by either party giving written notice to the other to that effect at least six months prior to the expiration of the preceding period, and a violation of any of the provisions of the agreement by either party, while entitling the other to a claim for damages and the usual remedies for specific enforcement, should not be held to void the agreement or to abrogate the obligations or the undertakings of either party thereto.

The so called Hepburn Act approved June 29, 1906, amended section 6 of the "Act to Regulate Commerce" of 1887 (familiarly called the Interstate Commerce Act) so as to provide, among other things: "nor shall any carrier charge or demand or collect or re-"ceive a greater or less or different compensation for such transporta-"tion of passengers or property or for any service in connection "therewith between the points named in such tariffs than the rates, "fares and charges which are specified in the tariff filed and in ef-"fect at the time."

On December 21, 1906 the Interstate Commerce Commission announced its report "In the Matter of Railroad-Telegraph contracts" 12 I. C. C. Reps. Vol. XII, p. 10, in which it affirmed and construed its previous rulings of September 5th and October 12th, 1906 and stated, among other things, that "the Commission knows of no provision in law now in force which vests it with any authority, or any clause in the law that affords it a reasonable ground to dif-
75 ferentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers."

The Commission further held that contracts with telegraph com-

panies could be lawfully entered in so far as they affect "on line" service.

On June 3, 1907 the Commission announced its Administrative Ruling No. 219, in which it referred to and amplified its previous rulings in respect of the subject matter here under consideration. On November 15, 1907 the Commission announced that its ruling No. 219 applied to telephone service and called upon carriers that had not already done so, to file with the Commission copies of all contracts for telegraph or telephone service on their lines and, as a result, all of the contracts then existing between the railroad companies and the telegraph companies throughout the United States for the exchange of services, were thereupon filed with the Commission and have since remained on file. In view of the ruling of September 15, 1906, the plaintiff, on October 1, 1906, informed the defendant that it would not further perform the contract so far as it affected "off line" services and in 1908 defendant filed a bill against plaintiff in the United States Circuit Court for the District of Maryland, praying that a decree might pass adjudging the contract to be in full force and effect and that the railroad specifically perform the same. An answer was duly interposed and by leave of the court the Interstate Commerce Commission, through its solicitor, submitted and filed a brief as amicus curiae and argument was heard by the court. Before the court rendered any decision the Congress enacted an act approved June 18, 1910, entitled "An Act to Create a Commerce Court and to Amend the Act entitled 'An Act to Regulate Commerce' approved February 4, 1887, as heretofore amended, and for other purposes," which extended the provisions of the Interstate Commerce Act to telegraph, telephone and cable companies
76 and amended section 1 of the Interstate Commerce Act so that it contained, among other provisions, the following: (the additions being underlined)

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided, further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services."

* * * * * * *

"No common carrier subject to the provisions of this Act shall

after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free tickets, free pass or free transportation for passengers except to its employees * * * Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided further, That this provision shall not be construed to prohibit
77 the privilege of passes or franks, or the exchange thereof with each other for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act."

After the act became law, the parties, acting on the belief that the intent of the statute was to permit the continued performance by them of all the obligations under the contract, consented to the withdrawal of the suit in Maryland and the court permitted such withdrawal. The parties thereupon proceeded to carry out the contract in accordance with it- terms until about April 25, 1916, when defendant refused to perform the provisions of the contract in respect of "off line" services, in view of a conference ruling of the Interstate Commerce Commission dated March 28, 1916, and plaintiff was notified by defendant that it would continue to carry out its contract in such regard only in the manner indicated by such ruling. This ruling was as follows:

"Upon inquiry as to whether or not under the provision of Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, Held, That while said carriers may contract for an
78 enchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

The answer of defendant in the suit at bar admits the allegations

of the complaint, alleges the facts as to the extent of defendant's telegraph system, and further sets forth that defendant, in view of certain rulings of the Interstate Commerce Commission and of the many and severe penalties which would attach should it do otherwise, and should such rulings be held to express the correct interpretation of the statute, felt compelled to refuse performance in the particulars named in the complaint although otherwise willing to carry out such contract in accordance with its terms. When the cause came on for hearing it was suggested by counsel that the Interstate Commerce Commission should be invited to participate, through its solicitor, as amicus curiæ and thus this suggestion having been approved by the court, an invitation accordingly was extended by the court to the Interstate Commerce Commission and that invitation was promptly and courteously accepted, with the result that a brief has been filed on behalf of the Interstate Commerce Commission and counsel, upon its behalf, has also participated in the argument, the understanding being that defendant will appeal if so advised and requested by the Interstate Commerce Commission.

79 MAYER, *District Judge:*

The Complaint sets up a cause of equity under the authority of such cases as Bank of Kentucky v. Stone et al., 88 F. R. 383, and United States Life Ins. Co. v. Cable, 98 F. R. 761.

The question here under consideration is the meaning of the expression "the exchange of services" as found in the Act approved on June 18, 1910.

The contract between these parties is typical of contracts between railroad companies and the Telegraph Co. throughout the United States and the importance of the question may be realized when it is stated that the telegraph lines operated and controlled by defendant comprise over 200,000 miles of poles and cables and over 1,000,000 miles of wire, that defendant has nearly 25,000 offices, about 20,000 of which are railroad offices, yielding revenues too small to pay for maintenance separate and apart from the advantage derived from contracts with the railroad companies and that a very large part of defendant's system is constructed in accordance with approximately 1,300 contracts with approximately 300 different railroads and railroad systems, all such contracts being similar in their underlying provisions with that between the parties to this suit.

Whether the meaning of the "exchange of services" is determined by (*a*) the narrow test of verbal literalism or (*b*) the broader rule of ascertaining the intention of the Congress "from the language used in the act and * * * by a resort to the history of the times when it was passed" (United States v. Trans-Missouri Freight Association, 166 U. S. 290, 318), the result is the same.

(*a*) "Exchange" has a well settled meaning in common acceptation. Webster's definition is "The act of giving or taking one thing for another which is regarded as an equivalent; as an exchange of cattle for grain"; but, while the trader may, for purposes of his own calculation, put his own value on his cattle or his

80 grain, the transaction as between the parties is not measured in money. The owner of the cattle wants grain, while the owner of the grain wants cattle and each is satisfied to exchange the thing for the thing instead of agreeing that the market value of the cattle is so much per head and the market value of the grain so much per bushel and exchanging on the exact basis of multiplying the unit by the number of heads or the number of bushels intended to be transferred one to the other.

This popular meaning of "exchange" used and understood in the common speech of people has been accepted and defined by codes and courts. No more apt nor concise definition can be found than that in the Civil Code of Louisiana (Article 2660): "Exchange is a contract, by which the parties to the contract, give one to the other, one thing for another, whatever it be, except money; for in that case it would be a sale." See also Civil Codes of California §1804, North Dakota, §6003, South Dakota, §1348 and Montana §5129. And the courts in one form of phraseology or another seem to have uniformly followed the definition of exchange given by Judge Story in Buffum v. Merry, 4 Fed. Cases 605, "What is a sale or exchange? Blackstone says it is a transmutation of property from one man to another in consideration of some price or recompense in value. If it be a commutation of goods for goods, it is more properly an exchange." Elwell v. Chamberlin, 31 N. Y. 611, 624; Cooper v. The State, 37 Ark. 412, 418; Chapman v. Hughes, 134 Cal. 641, 657; Forkner v. The State, 95 Ind. 406; Beardsley v. Cottrell & Babcock, 43 Ia. 194; Laboree v. Klosterman, 33 Neb. 150; Vail v. Strong, 10 Vt. 457, 467; Long v. Fuller, 21 Wis. 121, 124.

"Exchange of services" therefore, clearly refers to the kind of services which the railroad can render to the telegraph company and vice versa, in connection with the business of transmitting intelligence by telegraph for the railroad company or of transport-

81 ing men and material for the Telegraph Co., as the case may be. To say that the exchange must be on the basis of the lawful tariff rates of the Railroad and of the reasonable charges of the Telegraph Co., regularly charged other customers for similar services, is but another way of asserting that the proviso of the statute is without meaning. A statute was not necessary to figure out the service in this way, for such a method merely means that the Railroad in return for $100 worth of transportation at lawful rates may be paid by $100 worth of telegraph transmission charged at the reasonable and non-discriminatory rates secured by the statute—all of which could be done without the or any proviso, as a mere matter of bookkeeping; and, if it was intended that upon such a method of calculation any excess of services by the Railroad over the services of the Telegraph Co. or vice versa, should be paid for by virtue of the statute, then the Railroad and the Telegraph Co. were placed in no different relation with each other than they were with any one else and, hence, the proviso was meaningless and useless—a conclusion always avoided in construing a statute.

The views stated supra lead to the same result (although arrived at on a different theory) as the Commission applied to "on line"

service in its Conference ruling of March 28, 1916. In that ruling, the Commission sought to distinguish between "on line" and "off line" service and such is now the position of its counsel. The argument is thus stated:

"Where a railroad company transports free or at reduced rates the men or material of a telegraph company engaged or to be used in the construction of telegraph facilities along the lines of the railroad, it is performing for the shipper a service so closely analogous to the transportation of its own employees and property as not to transcend the spirit of the Act. So also, where a telegraph company transmits the messages of a railroad company between points
82 along the lines of the railroad, it is performing a service which the railroad, but for the contract of exchange, would have to perform for itself, and the performance of such services by the telegraph company free or at reduced rates is not in contravention of the statute. * * *

Where a railroad company, however, transports the men or material of a telegraph company for the construction or maintenance of service off the lines of the railroad, or where the telegraph company transmits the messages of the railroad to or from points off its lines, each company is performing for the other a service practically identical with the service which each respectively renders for the public. For either of such carriers to render such services at other than the regularly published rates and reasonable charges prescribed in the Act would be to discriminate against other shippers, passengers, and senders of telegrams not so favored."

But there is nothing in the statute nor in its "spirit" which justifies this distinction. The Congress by appropriate and concise language could have differentiated between "on line" and "off line" services. On the contrary, however, its words "the exchange of services" were of the broadest character and without limitation as to whether the "services" were "on line" or "off line"; and it is significant that in a statute bringing in telegraph, telephone and cable companies for the first time and having as one of its important features the safeguarding of the public against discrimination, so pronounced an exception should be made without qualifications of any kind, in respect of contracts with common carriers, "for the exchange of services."

(*b*) Where, in addition to the language of the statute, considered by itself, the intention of the Congress is sought in
83 the light of relevant history, the construction already indicated is amply confirmed.

As counsel for defendant said in the suit in Maryland between these same parties: "The railroad and the telegraph are the Siamese Twins of Commerce, born at the same period of time, developed side by side, united by necessity; and * * * what the laws of trade and usage have thus joined together it could not have been the purpose of Congress to put asunder * * *."

Since the middle of the last century the railroads and the telegraph company entered into the relations illustrated by the contract

here under consideration and, as in this case, these contracts have been renewed from time to time, their duration being for long periods of years, all looking to the establishment of a settled status and modus vivendi by virtue of the very nature of the contract and the business and operating relations of the parties.

At the outset, it is apparent that the contract contains important provisions so interwoven and so interdependent that it must be regarded as an entire contract. Obviously such a contract is entered into only after the most careful consideration, involving an understanding of the practical and financial results to each of the parties. The provisions as to rights of way, joint superintendency and the like, and the value of the services each to the other, including, among other things, the payment by the Telegraph Co. to the Railroad of $60,000 per annum, all demonstrate that the exchange of railroad service as such for telegraph service as such, rests on the other mutual obligations secured by the contract. That this was known and appreciated by the Commission appears fully from its rulings. With its knowledge, based upon comprehensive experience in regard to and understanding of administrative features and effects, the Commission clearly indicated that its rulings were based solely on its interpretation of the statutes and not upon any detrimental
84 results which would follow from the interpretation contended for by the railroads and the telegraph companies.

In its Twenty-first Annual Report to the Congress dated December 23, 1907, the Commission referred to its rulings made up to that time and stated its views in the language of its ruling of December, 1906, a significant part of which was:

"Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are sui generis and unlike any other contracts with carriers that have come to our attention. So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely."

In its Twenty-second Annual Report to the Congress dated December 24, 1908, the Commission again referred to its rulings and reports in respect of this subject matter.

The Annual Report of 1909 made no reference to the subject matter and, although dated December 21, 1909, there is nothing to show when or if it was laid before the Sixty-first Congress which reconvened January 4, 1910, and adjourned sine die June 25, 1910.

The Sixtieth Congress was not in session at the date of the 1908 report and, as it held a session of only two months in the winter of 1909, it probably had no opportunity to consider the Report of 1908.

It may, however, fairly be assumed that the Sixty-first Congress gave consideration to the reports of 1907 and 1908 from the administrative body peculiarly equipped to inform it in respect of matters coming under its (the Commission's) observation.

Aldridge v. Williams, 3 How. 9;
United States v. Union Pacific R. R. Co., 91 U. S. 72, 79;
United States v. Trans-Missouri Freight Association, supra.

85 The bill creating the Commerce Court in which the amendment of 1910 was incorporated, was an elaborate measure and the proviso here considered could not have been evolved from inner consciousness nor suddenly have been flashed from a clear sky.

Resort to the Commission's reports and to the contracts on file then showed, as it does now, that the Commission apparently reluctantly had made a sort of divided ruling going as far as it felt it could in preserving the integrity of these contracts and going no further only because of its interpretation of the applicable statutes, but contemporaneously announcing most affirmatively that the full performance of the contracts would not affect any public or private interest adversely. Further, this ruling was not accepted nor acquiesced in and, in the absence of clear and explicit language, it seems idle to contend that the Congress was merely incorporating the rulings of the Commission in the statute distinguishing between "on line" and "off line" services when inter alia, under its jurisdiction as to carriers, the Commission had already recognized the lawful character of the contracts as affecting "on line" services and, when the Congress, almost by *by* virtue of lay knowledge, must have appreciated that "off line" service may be as vital to telegraph or railroad operation "on line" as "on line" service.

Thus, if a bridge has been swept away at A, on the line of the railroad, is it any less vital to telegraph that intelligence to a connecting carrier at B off the line, than to the railroad's agent at C on the line; or if a telegraph wire has been destroyed at A at a point one yard off the line, is it any less vital for the railroad to transport men and material to replace the destroyed wire than to do the same transportation to replace the same destroyed wire at B on the line, one yard this side of A? That the courts will not take so narrow or differentiated a view of the statute as to answer these questions in the affirmative has already been indicated by United States
86 v. Erie Railroad, 235 U. S. 513, and United States v. Erie Railroad, 236 U. S. 259.

In addition to these considerations, it is further fair to assume that the Congress had knowledge of the necessarily intimate relation between the railroads and the telegraph companies as shown by its own Acts and the decisions of courts.

Pacific Railroad Act of July 1, 1862 (12 Stat. at Large, 489).

Texas & Pacific Incorporation Act of 1871 (16 Stat. at Large, 573).

Indian Reservation Railroad Act of 1899 (30 Stat. at Large, 990).

Enid, etc., Railroad Act of 1902 (32 Stat. at Large, 43).

United States v. Union Pacific Ry. Co., 160 U. S. 1.

St. Paul, M. & M. Ry. Co. v. Western Union Telegraph Co., 118 Fed. 497.

United States v. Northern Pacific R. R. Co., 120 Fed. 546;

Western Union Telegraph Co. v. Pa. R. R. Co., 195 U. S. 540;

Western Union Telegraph Co. v. Pa. R. R. Co., 129 Fed. 849.

It is unnecessary to elaborate further upon additional facts and arguments advanced by the parties in support of the contention that the Conference Ruling of March 28, 1916, cannot be sustained. But there are some significant observations in the opinion of Mr. Justice McKenna in United States v. Erie Railroad, 236 U. S. 159, which are here serviceable.

First. As concisely stated in the headnote "A ruling of the Interstate Commission which was never enforced—the custom of the carriers being uniformly the other way—cannot have the weight ordinarily accorded to the contemporaneous construction of a statute by the officers upon whom is imposed the duty of administering it.

87 Second. Analogously with the observation as to the interchange of passes that the Congress considered "that the best safeguard against its abuse was the interest of the carriers" and that the exercise of the right "has its justification in a strictly business policy, and instead of being a burden upon the resources of the companies it is an aid to them," it may be similarly said here that the exchange of services whether viewed in its comprehensive aspect or merely as an exchange of telegraph service as such for railroad service as such, is based on business policies providently entered upon and safeguarded by self interest and so the Congress must have realized. The contracts do not provide for "free" services in the true sense, they are not within the evil which evoked remedies against practices such as are discussed in Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, and Chi. Ind. & L. Ry. Co. v. United States, 219 U. S. 486, but they are, indeed, sui generis, entitled in the interest both of the public and the parties to be completely performed in accordance with their provisions and in accordance with what seems undoubtedly to have been the intent of the statute.

It follows that plaintiff may have a decree as prayed for.

JULIUS M. MAYER,
District Judge.

February 19, 1917.

Settle decree on notice to all counsel who participated in the argument.

——— ———,
U. S. D. J.

88 *Assignment of Errors. Filed March 2, 1917.*

United States District Court, Southern District of New York.

In Equity.

No. 14–45.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Comes now the Defendant, and files the following assignment of errors upon which it will rely upon its appeal from the decree made by this Honorable Court on the 28th day of February, 1917, and filed in the office of the Clerk of the above Court on said date:

I.

The Court erred in finding that the contract dated October 15th, 1887, between complainant and defendant, a copy of which is attached to the bill of complainant as Exhibit A, is lawful and binding upon the parties thereto, and still in full force and effect in all of its provisions notwithstanding the Conference Ruling of March 18th, 1916, of the Interstate Commerce Commission, and notwithstanding the action of the defendant herein in respect of such contract or agreement or in asserted compliance with such ruling.

II.

The Court erred in ordering that the defendant specifically perform said contract of October 15th, 1887, between complainant and defendant.

89 III.

The Court erred in ordering that defendant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract of October 15th, 1887, between complainant and defendant.

IV.

The Court erred in finding that the language:

"And provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

as used in Section 1 of the Act to Regulate Commerce as amended June 18th, 1910, (U. S. Comp. Stat. §8563 subd. 3) authorizes the

making of contracts, or the continued performance of the contract theretofore made, between the complainant railroad company and the defendant telegraph company, dated October 15th, 1887, by the terms of which said companies agree to exchange services upon bases other than the basis of the lawful rates of said railroad company, as published and filed in accordance with the provisions of Section 6 of said Act to Regulate Commerce, and of the reasonable charges of said telegraph company regularly charged other customers for similar services.

V.

The court erred in making and entering a decree in favor of complainant and against defendant.

In order that the foregoing assignment of errors may be and appear of record, the defendant presents the same to this Honorable Court, and prays that such disposition be made thereof as in accordance with law and statutes of the United States in such cases made and provided, and defendant prays a reversal of the said decree made and entered by said Court.

March 1, 1917.

RUSH TAGGART,
Solicitor for Defendant,
195 *Broadway, New York City.*

90 *Citation and Proof of Service. Filed March* 2, 1917.

To the Baltimore & Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit, to be held at the Borough of Manhattan, City of New York, in the Southern District of New York, in the Circuit above named, on the 5th day of March, 1917, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein The Western Union Telegraph Company is appellant and you are appellee, to show cause, if any there be, why the errors in said appeal above mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, City of New York, in the District and Circuit above named, this 2d day of March in the year of our Lord, one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred*th* and forty-first.

MARTIN T. MANTON,
Judge of the United States District Court,
Southern District of New York.

Service of a Copy of the within citation is admitted this 2d day of March, 1917.

WHITE & CASE,
Solicitors for Complainant.

91 *Stipulation.*

United States District Court, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the record herein numbered from pages 1 to 93, both inclusive, contains all of the records, papers and documents in this action that are necessary and material upon review of the decree herein by the Circuit Court of Appeals for the Second Circuit, and that the same may be certified by the Clerk of the United States District Court to the Appellate Court as the complete return herein upon which the appeal may be heard; that the filing of a præcipe is hereby waived and that the appeal herein be placed upon the calendar of the United States Circuit Court of Appeals for the Second Circuit for the term thereof commencing March 5th, 1917.

March 1, 1917.

WHITE & CASE,
Solicitors for Complainant.

RUSH TAGGART,
Solicitor for Defendant.

92 *Stipulation Waiving Filing of Bond for Costs.*

United States District Court, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the defendant-Appellant, the Western Union Telegraph Company, shall not be required to give a bond or undertaking for costs on appeal to the United States Circuit Court of Appeals for the Second Circuit, the Complainant-Appellee hereby waiving all requirements of the statutes or Rules of Court in that behalf.

March 1, 1917.

WHITE & CASE,
Solicitors for Complainant.

RUSH TAGGART,
Solicitor for Defendant.

93 *Clerk's Certificate.*

United States District Court, Southern District of New York.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, upon the foregoing stipulation do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 3d day of March in the year of our Lord, one thousand nine hundred and seventeen and of the Independence of the United States the one hundred*th* and forty-first.

[L. S.] ALEX GILCHRIST, JR., *Clerk.*

94 United States Circuit Court of Appeals for the Second Circuit.

Before: Hon. Henry Galbraith Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

Appeal by Defendant from Final Decree in Equity Entered in the District Court for the Southern District of New York.

Rush Taggart for Western Union Telegraph Co., appellant; (Joseph W. Folk, solicitor for Interstate Commerce Commission filed a brief as amicus curiæ.)

J. Du Pratt White, for Baltimore & Ohio Railroad Co. (W. F. Brownell, as amicus curiæ, also argued for appellee.)

Per CURIAM: The real contest in this case is between the plaintiff and defendant on one side and the Interstate Commerce Commission on the other, and the sole question presented in argument or

by assignment of error is whether under the Act to regulate
95 commerce as amended June 18, 1910, it is lawful for railway and telegraph companies to observe the terms of a contract made between them, (and lawful when made) long before passage of the statute referred to. We express no opinion on any other point.

The District Court (Mayer, J.) has written an ample and correct statement of facts taken from the pleadings,—the hearing below having been on bill and answer. With the premises and conclusions of the trial Judge we agree.

The railroad and the telegraph became instrumentalities of commerce at substantially the same time. They advanced hand in hand, and agreements by which each agreed to serve the other for the common benefit have been known and observed for more than two generations. Indeed they long ago became but parts of one system,—so far as the public was concerned.

The parties hereto made a written agreement in 1887, which is still unattacked except in one point, which may be summarized as follows: The Railroad Company transports men and material, and furnishes labor to the Telegraph Company without limit so far as the erection and maintenance of the telegraph system on the railroad company's property is concerned. The Telegraph Company in turn transmits orders and intelligence along the Railroad Company's property also without limit, so far as the maintenance and
96 traffic management of the railroad is concerned; and each Company further serves the other with regard to that other's business in respect of business matters not directly connected with the line of railroad along which the telegraph lines extend.

These two kinds of work are commonly known, the former as "on line" business, the latter as "off line" business.

At stated periods the amount of "off line" business transacted by each for the other is ascertained and balances discharged (as in a clearing house) at a rate of settlement or exchange fixed at one-half of the ordinary rates of each party to the agreement. The right to do this is the only question in this case.

Not until the amendment of 1910 were telegraph companies subject to the commerce acts, and the jurisdiction of the Commission. By a proviso in that statute it was declared that

"nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

In our opinion (in the absence of fraud) the right to exchange implies the right to fix the rate, method or amount of exchange. The agreement being to exchange the carriage of goods against the transmission of intelligence, each party has the further right to fix the value of the services of each to the other; it makes no difference whether for convenience they ascertain that value by the usual money measurement or adopt some other course.

97 If it were shown that this contract or any other agreement, were being used as a cover for injuring one party or the pub-

lic, other rules would apply. Nothing of the kind being suggested, the decree is affirmed.

98 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Baltimore & Ohio R. R. Co. vs. Western Union Tel. Co. Opinion per Curiam.

99 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 14th Day of May, One Thousand Nine Hundred and Seventeen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

v.

WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
C. M. H.

100 Endorsed: United States Court of Appeals, Second Circuit. B. & O. R. R. v. Western Union Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 14, 1917. William Parkin, Clerk.

101 United States Circuit Court of Appeals for the Second Circuit.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

The above named defendant-appellant The Western Union Telegraph Company, conceiving itself aggrieved by the order and decree made and entered by the above named court, in the above entitled cause, under date of May 14th 1917, wherein and whereby it

was ordered, adjudged and decreed that a certain order and decree made in the above entitled cause under date of February 28, 1917, be affirmed, wherein it was decreed that a certain contract dated October 15, 1887, between the complainant-appellee and defendant-appellant, a copy of which is attached to the bill of complaint herein as Exhibit "A," is lawful and binding upon the parties thereto, and is still in full force and effect in all of its provisions, notwithstanding the Conference Ruling of March 28, 1916, of the Interstate Commerce Commission; that the defendant-appellant specifically perform said contract; that defendant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract; and that the provisions of the Act to Regulate Commerce as amended June 18, 1910, (U. S. Com. Stat. Sec. 8563, sub. div. 3) authorizes

102 the making of contracts, or the continued performance of contracts theretofore made, between the complainant Railroad Company and the defendant Telegraph Company, by the terms of which said companies agree to exchange services upon bases other than their regular tariff rates; and this being a case in which a judgment or decree of the said Circuit Court of Appeals is not made final, and that the matter in controversy in this suit exceeds $1,000, besides costs; does hereby appeal from the said order and decree of affirmance dated May 14th 1917, to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herein, and it prays that this appeal may be allowed directing the Clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record, proceedings and papers in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

RUSH TAGGART,
Solicitor for Defendant-appellant.

103 United States Circuit Court of Appeals for the Second Circuit.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

Upon the foregoing petition it is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed.

C. M. HOUGH,
United States Circuit Court Judge.

104 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. The Baltimore & Ohio Railroad Company, Complainant-appellee, against The Western Union Telegraph Company, Defendant-appellant. Petition and Order for Appeal.

Rush Taggart, Esq., Attorney for Defendant-appellant.

Service of a copy of the within petition and order is this day admitted. Dated May 25, 1917. White & Case, Attys. for Complt.-respdt.

United States Circuit Court of Appeals, Second Circuit. Filed May 28, 1917. William Parkin, Clerk.

105 United States Circuit Court of Appeals for the Second Circuit.

In Equity.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant-appellee,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant-appellant.

Assignment of Errors.

The appellant in the above entitled cause in connection with its petition for appeal herein presents and files therewith its assignment of errors as to which matters and things it says that the decree entered herein on the 14th day of May, 1917, is erroneous ,to-wit:

I.

The Court erred in affirming the decree made by the United States District Court for the Southern District of New York, on the 28th day of February, 1917, wherein that Honorable Court found that the contract dated October 15, 1887, between complainant-appellee and defendant-appellant, a copy of which is attached to the bill of complaint as Exhibit "A," is lawful and binding upon the parties thereto and still in full force and effect in all of its provisions, notwithstanding the Conference Ruling of March 28, 1916, of the Interstate Commerce Commission, and notwithstanding the action of the defendant-appellant herein in respect of such contract or agreement or in asserted compliance with such ruling.

106 II.

The Court erred in affirming the decree made by the United States District Court for the Southern District of New York on the 28th day of February, 1917, wherein that Honorable Court ordered that the defendant-appellant specifically perform said contract of October 16, 1887, between complainant-appellee and defendant-appellant.

III.

The Court erred in affirming the decree made by the United States District Court for the Southern District of New York on the 28th

day of February, 1917, wherein that honorable Court ordered that the defendant-appellant be perpetually enjoined and restrained from in any manner violating any of the provisions of said contract of October 15, 1887, between complainant-appellee and defendant-appellant.

IV.

The Court erred in affirming the decree of the United States District Court for the Southern District of New York, made on the 28th day of February, 1917, wherein that Honorable Court found that the language:

"And provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of service"

as used in Section 1 of the Act to Regulate Commerce, as amended June 18, 1910, (U. S. Comp. Stat. Sec. 8563, sub. div. 3) authorizes
the making of contracts or the continued performance of the
107 contract heretofore made, between the complainant-appellee Railroad Company and the defendant-appellant Telegraph Company, dated October 15, 1884, by the terms of which, said companies agree to exchange services upon bases other than the basis of the lawful rates of said Railroad Company as published and filed in accordance with the provisions of Section 6 of said Act to Regulate Commerce, and of the reasonable charges of said Telegraph Company regularly charged other customers for similar services.

V.

The Court erred in making and entering a decree affirming the decree of the court below.

VI.

The Court erred in not reversing the decree of the court below.

Wherefore the appellant prays that said decree may be reversed and that the appellant may have an adjudication and decree in its favor as herein specified.

Dated, May 24, 1917.

RUSH TAGGART,
Solicitor for Defendant-appellant,
195 *Broadway, New York City, N. Y.*

108 Endorsed: United States Circuit Court of Appeals for the Second Circuit. The Baltimore & Ohio Railroad Company, Complainant-appellee, against The Western Union Telegraph Company, Defendant-appellant. In Equity. Assignment of errors. Rush Taggart, Esq., Solicitor for Defendant-appellant, 195 Broadway, New York City, N. Y.

Gr'd. C. M. H., U. S. C. J.

Service of a copy of the within assignment of errors is this day admitted. Dated May 25, 1917. White & Case, Attys. for Complt. Respt.

United States Circuit Court of Appeals, Second Circuit. Filed May 28, 1917. William Parkin, Clerk.

109 American Surety Company of New York.

Capital $5,000,000.

United States Circuit Court of Appeals for the Second Judicial Circuit.

THE BALTIMORE & OHIO RAILROAD COMPANY, Complainant,

against

THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

Know all men by these presents, That we, Western Union Telegraph Company, as Principal, and the American Surety Company of New York, as Surety, are held and firmly bound unto the above named The Baltimore & Ohio Railroad Company, in the sum of five hundred and 00/100 dollars ($500.00), to be paid to the said The Baltimore & Ohio Railroad Company, its successors or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 24th day of May, one thousand nine hundred and seventeen.

Whereas, the Western Union Telegraph Company has prosecuted an appeal to the Supreme Court of the United States from the decree of the United States Circuit Court of Appeals, Second Judicial Circuit, entered on or about the 14th day of May, 1917, in the above entitled suit:

Now, therefore, the condition of this obligation is such, That if the above named Western Union Telegraph Company shall prosecute said appeal to effect, and if it fails to make its plea good, shall answer all damages and costs that may be awarded against it, then this obligation to be void, otherwise to remain in full force and virtue.

WESTERN UNION TELEGRAPH COMPANY.
By ANDREW F. BURLEIGH.
AMERICAN SURETY COMPANY OF NEW YORK.
By MARSHALL L. BROWER,
Resident Vice President.

Attest:
[L. S.] LOUIS PAPEN,
Resident Assistant Secretary.

94935.

110 STATE OF NEW YORK,
County of New York, ss:

On the twenty-fifth day of May in the year 1917, before me personally came Andrew F. Burleigh to me known, who being by me duly sworn, did depose and say: that he resided in —— that he is the President of Western Union Telegraph Company the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

[NOTARIAL SEAL.] C. A. VAN BRUNT,
Notary Public Kings County, No. 6.

Certificate filed in New York, No. 14.
My commission expires 3/30/18.

110½ STATE OF NEW YORK,
County of New York, ss:

On this 20 day of May, 1917, before me personally appeared Marshall L. Brower, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in The City of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with Louis Papen and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Louis Papen subscribed to the said instrument is in the genuine handwriting of the said Louis Papen and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Marshall L. Brower, Resident Vice President.

[L. S.] C. A. STUMPF,
Notary Public.

New York County No. 853. Reg. 9066.
Bronx County No. 1. Reg. 907.
Kings County No. 111. Reg. 9116.
Certificates filed in Dutchess, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester Counties.
Commission expires March 30, 1919.

111 STATE OF NEW YORK,
County of New York, ss:

Louis Papen being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

LOUIS PAPEN.

Subscribed and sworn before me this 24 day of May, 1917.
[L. S.]
C. A. STUMPF,
Notary Public.

New York County No. 853. Reg. 9066.
Bronx County No. 1. Reg. 907.
Kings County No. 111. Reg. 9116.
Certificates filed in Dutchess, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster and Westchester Counties.
Commission expires March 30, 1919.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Financial Statement March 31, 1917.

Resources.

Real Estate:			
Home Office Building and Land, unencumbered	$3,200,000.00		
N. Y. City Water Front, unencumbered	215,000.00		
Appraised value by N. Y. Insurance Dept.		$3,415,000.00	
Stocks and Bonds, Market Value		3,926,410.63	
Special Reserve Fund Investment		250,000.00	
Mortgage and Collateral Loans, Judgments and Decrees		834,979.19	
Cash in Banks and Offices		1,133,651.32	
Interest in Excise Reinsuring Fund		72,631.95	
Premiums in Course of Collection	$961,042.43		
Less amount 3 months or more old	298,892.70		
		662,149.73	
Accrued Interest and Rents		48,012.19	
Salvage Recoverable		110,105.94	
			$10,452,940.95

Form G 362—*Continued.*

Liabilities.

Capital Stock	$5,000,000.00	
Surplus and Undivided Profits	1,785,325.01	
Special Reserve	250,000.00	
Reserve for Unearned Premiums	2,296,606.80	
Reserve for Contingent Claims	748,234.75	
Reserve for Expenses and Taxes	272,800.00	
Reinsurances and Accounts Payable, not due	34,267.24	
Premiums Paid in Advance	65,707.15	
		$10,452,940.95

Special Deposits, required by insurance laws of various States, not considered.

113 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 16, 1917, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees,

American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, December 12, 1916, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *.

Place.	Resident Vice Presidents.	Resident Assistant Secretaries.
New York, N. Y.	Marshall L. Brower.	Marshall L. Brower.
	A. E. Cotterell.	William H. Bishop.
	William M. Tomlins, Jr.	A. E. Cotterell.
	Lester S. Moore.	Charles S. Waterbury.
	William H. Bishop.	Daniel Stewart.
	George R. Crosby.	E. D. Sadler.
	W. H. E. Reinecke.	George R. Crosby.
	E. D. Sadler.	W. H. E. Reinecke.
		E. J. Sabater.
		Louis Papen.
		Benjamin A. Willis.
		Robert L. Neptune.
		Peter H. May.

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to

any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 23rd day of January, 1917.

(Signed) W. H. RILEY,
[L. S.] *Assistant Secretary.*

114 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. The Baltimore & Ohio Railroad Company, Plaintiff, against Western Union Telegraph Company, Defendant. Appeal Bond.

United States Circuit Court of Appeals, Second Circuit. Filed May 28, 1917. William Parkin, Clerk.

I approve of the within undertaking both as to form and sufficiency of the surety. C. M. Hough, C. J. 5/25/17.

Service of a copy of the within appeal bond is this day admitted together with approval thereof. Dated May 25, 1917. White & Case, Attys. for Complt.-Respdt.

115 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 114 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Baltimore & Ohio Railroad Company against Western Union Telegraph Company as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern Dis-

trict of New York, in the Second Circuit, this 29th day of May in the year of our Lord One Thousand Nine Hundred and Seventeen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

116 The United States Circuit Court of Appeals, Second Circuit.

THE UNITED STATES OF AMERICA, *ss:*

To the Baltimore & Ohio Railroad Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein The Western Union Telegraph Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. Edward Douglass White, Chief Justice of the Supreme Court, the 25th day of May, in the year of our Lord, One thousand Nine Hundred and Seventeen.

—— ——.

Allowed by
C. M. HOUGH,
Judge United States Circuit Court
of Appeals, Second Circuit.

117 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. The Baltimore & Ohio Railroad Company, Complainant-appellee, against The Western Union Telegraph Company, Defendant-appellant. Original Citation.

United States Circuit Court of Appeals, Second Circuit. Filed May 28, 1917. William Parkin, Clerk.

Rush Taggart, Esq., Attorney for Defendant-appellant.

Service of a copy of the within citation is this day admitted. Dated N. Y. May 25, 1917. White & Case, Atty. for Complt.-respdt.

Endorsed on cover: File No. 26,021. U. S. Circuit Court Appeals, 2d Circuit. Term No. 554. The Western Union Telegraph Company, appellant, vs. The Baltimore & Ohio Railroad Company. Filed June 30th, 1917. File No. 26,021.